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Editor's Introduction

Maria Federica Moscati

University of Sussex

Dear Reader,

Composing my editorial after attending a performance at the theatre has turned out to be an inspiring choice. I am writing this after being immersed in the beauty of the Royal Ballet School's *A Centenary Celebration* at the Royal Ballet and Opera House (RBOH).[1] During the intervals of the show, I took notes and, on my way home, I reflected on how the performance spoke to this edition of *Amicus Curiae* and invited me to make connections between what I have seen on stage and this issue of the journal.

Let's start with the title of the performance—*A Centenary Celebration*—which mirrors two celebratory sections of this edition. The first is the Special Section, "Celebrating Carrie Menkel-Meadow … The Researcher, the Lawyer, the Woman, the Brilliant Friend!", with contributions from Sara Berman, Naomi Creutzfeldt, Letizia Coppo, Faina Milman-Sivan, Orna Rabinovich-Einy, Michael Palmer, Nicolás Parra-Herrera, Ulrike Schultz, Ana M Silva, Michalyn Steele, and myself. The authors—who are Carrie's former students, colleagues, and friends—heartfeltly engage with Carrie's work and its impact but also celebrate the "woman" by sharing personal memories of their relationships with Carrie. An interview with Carrie opens this Special Section, offering the reader new insights into her work, her new projects, her reflections on the challenges that students, teachers and researchers are facing nowadays, and her passion for the arts, including dance. To put it in the words of Dame Ninette de Valois: "Respect the past, herald the future, but concentrate on the present."[2] This is what Carrie does!

The second celebration, included in our Visual Law series, is "In Celebration of the Work of Simon Roberts (1941–2014)" by Chulwoo

[1] See "A Centenary Celebration" and "Insights: The Royal Ballet School – A Centenary Celebration".

[2] Royal Ballet School, "History".



Centenary (picture by Giovanna Lamboglia).[3]

Lee, Marian Roberts and Michael Palmer. This piece draws upon Chulwoo Lee's translation into Korean of Simon's *Order and Dispute: An Introduction to Legal Anthropology* (1979; 2013). The three essays rightly suggest that: "*Order and Dispute* endures because it asks fundamental questions about how humans create and maintain social order, and it refuses easy answers rooted in Western institutional assumptions." During the show at RBOH, Vadim Muntagirov's[4] perfect execution of the male role in the Act III *pas de deux* from *Swan Lake* (the "*Black Swan*" *pas de deux*) that he performed with Fumi Kaneko[5] made my thoughts turn to Simon. Much like a principal dancer, Simon shaped his research and teaching with precision, presence, passion, and generosity towards his students—always adding something unique.

Moving on, the performance offered a balance of classic ballet repertoire and more modern choreography, and, in between *Unforgettable* by Joshua Junker[6] and the *Black Swan pas de deux*, I pondered how a similar contrast can be discerned in this issue of *Amicus Curiae*. The immediate answers seem to be offered in the reflections on the ways and extent to which the role of the judge can be innovated, challenged, and preserved that

[3] See Dance Connections Agency and Giovanna's Instagram.

[4] See his profile page.

[5] See her profile page.

[6] See his Instagram post.

is addressed in these pages by The Rt Hon Lady Wise in her "Sir Henry Brooke Lecture 2026: The Twenty-First Century Judge–Privileges, Pitfalls and Potential" and by Jwalika Balaji, Anshul Dalmia, Sann Elfving, Laura-Theresa Godau & Claerwen O'Hara, Carolynn Gray, and Salomé Lannier & Hoko Horii in the Queer Judgments Project Special Section, edited by Alex Powell, Yerram Behara & Joanne Stagg, which follows a previous one published in Amicus Curiae 7(1).

During the intervals at the Royal Ballet, it was natural to exchange, with the other members of the audience, comments about the choreography, the music, the dancers and the overall scenography, and I realized that, in this issue, the role of commentators is ably delivered by Amy Kellam, Kfir Lapid-Mashall, and Geoffrey Samuel in their book reviews.

To watch the final piece of the performance (see picture on page vii), titled *Centenary*, by Valentino Zucchetti,[7] would be invaluable to law students, lecturers and researchers because it offers many insights into law, and, coincidentally, into this issue, speaking as it does to the importance of relations. Likewise in this issue, in the introduction to the Special Section on "Relations and Health—Interdisciplinary Reflections", its editor, Marianna Iliadou, writes that:

> The theme behind this Special Section is that relations are fundamental to health and healthcare. They shape how care is provided and received, how decisions are made, how vulnerability and autonomy are understood, and how rights and responsibilities are distributed.

Centenary also demonstrates that the creation of a magnificent choreography that brings on stage hundreds of dancers from all levels, all together, requires knowledge and expertise from diverse backgrounds. Likewise, in this *Amicus Curiae*, the note "Reflections of a Mediator on Inheritance Mediation: Are Family Inheritance Mediators Receiving Appropriate Training and Adequate Practice Support?" by Andrew Sims—based on the author's personal practical experience as a mediator—suggests what mediation training should encompass to support practitioners in mediating inheritance disputes effectively and safely.

On social media, Zucchetti wrote "everyone asked me how I did manage to move all these people, that wasn't the hard part, the hard part was condensing this monumental amount of talent in a 12min piece".[8]

[7] See his website and profile page.

[8] See his Instagram page.

This prompted me to think about Shuo NIE and Yang LIN and their Visual Law contribution, "Making Authority Visible: Bodily Discipline and the Political Appropriation of the Visual Grammar of Judgment in *Farewell My Concubine*" in which they examine "how bodily posture, costume, voice, space and spectatorship render roles and authority socially legible and distinguish legal authorization from embodied legibility" and argue that "the visual grammar of judgment is portable across institutional settings".

Further, the choreography by Valentino Zucchetti majestically shows that it is possible to share the stage with many people as a group in harmony while still giving space to each dancer to shine. This brought me to think about Neemah Ahamed's article in which she argues how, in the context of workplace sexual harassment, recognizing and addressing the inequalities that Black women face in seeking access to justice remains a pertinent issue. This contribution discusses aspects of the author's empirical work on the role of Black women's intersectional identities in influencing their tendency to seek redress for these harms in England and Wales.

The Royal Ballet School's *A Centenary Celebration* powerfully represented the significant role of a school in nurturing intergenerational collaborations, and the importance of empowering—through teaching/school—young generations. A quote in the programme of the performance puts it beautifully:

> At the core of the Royal Ballet School's work is the belief that artistic excellence is inseparable from human excellence, and that the greatest artists are built by investing in the whole person. (2026: 33).

Likewise, we, the law teachers and researchers, in this time of artificial intelligence, inflated social media profiles, and normalization and spectacularizing of violence, can make a difference when we go into the classroom to teach; there we not only transfer our knowledge to our students, but we do so in the awareness of the importance of being good people.

As at the end of every show, this editorial also signs off with a *révérence*, thanking all the contributors to this *Amicus Curiae* 8:1, the Institute of Advanced Legal Studies, my co-editors Amy Kellam and Pablo Cortes, the consultant editor Michael Palmer, the production editor Marie Selwood, the digital manager Narayana Harave, the news compiler Eliza Boudier, and, of course, all the readers!

Enjoy your reading.

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Roberts, Simon. *Order and Dispute: An Introduction to Legal Anthropology*. Harmondsworth: Penguin Books, 1979 (2nd edn, New Orleans LA: Quid Pro LLC, 2013).

Royal Ballet School. *A Centenary Celebration.* London: Royal Ballet & Opera, 2026.

Sexual Harassment, Power and Barriers to Access to Justice: An Intersectional Analysis

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Abstract

In the context of workplace sexual harassment, recognizing and addressing the inequalities that Black women face in seeking access to justice remains a pertinent issue. This article discusses aspects of the author's empirical work on the role of Black women's intersectional identities in influencing their tendency to seek redress for these harms in England and Wales. It draws on intersectionality theory and Rebecca Sandefur's framing of inequalities which shape how individuals engage with legal and legal-like institutions. The article refines Sandefur's understanding of inequalities by demonstrating how different aspects of identity interact with power to influence an individual's decision about pursuing formal avenues of redress. It argues that the participants' decisions on whether to seek legal recourse are shaped by their assumptions about judges and lawyers not recognizing their experiences or giving due credibility to their grievances. The participants' perceptions also influence their willingness to use legal resources to access justice.

Keywords: access to justice; intersectionality; sexual harassment; power.

[A] INTRODUCTION

This article explores the role of identity in shaping the pursuit of access to justice among the Black women who participated in the study. It addresses the question: to what extent do Black women's intersecting identities and power disparities in the workplace influence their decisions to seek redress for sexual harassment? Drawing on the participants' testimonies, this article argues that their decisions to seek redress are shaped by overlapping dimensions of identity, such as race, gender and skin tone, alongside concerns about how experiences of harms may be interpreted in legal settings. The article contributes to the legal discourse on access to justice in England and Wales. Its

originality resides in relying on a "people-centred" approach (Sandefur & Ricca 2024: 59) to understand how inequalities affect an individual's decision to seek legal redress through an intersectional lens. The article also extends the empirical literature in access to justice in three ways. First, it reveals that when intersectional harms remain unrecognized in the anti-discrimination laws in the Equality Act 2010 (EqA), and where individuals anticipate that such harm will not be fully appreciated by legal actors, recognition is a barrier to seeking recourse. Second, it highlights that unequal access to legal knowledge and support services, including organizations such as the Citizens Advice Bureaux (CABx), operates as a barrier to accessing help. Third, the study's findings refine Sandefur's understanding of resources and highlight that, although grievance procedures were available to participants, the interplay between power dynamics and their intersectional identities negatively influenced their decisions for pursuing redress.

This article draws on the author's doctoral project (the study) (Ahamed 2025a). The main research question was concerned with the extent to which intersectional aspects of the Black women participants' identities influenced their understanding of their workplace sexual harassment experiences and decision to seek access to justice in England and Wales. An earlier article (Ahamed 2025b) by the author drawing on the same study (Ahamed 2025a), relied on Felstiner and colleagues' "naming, blaming claiming" framework to examine the degree to which the participants' perceptions of their intersectional identities shaped their ability to recognize their harms (naming), the factors that influenced their attribution of responsibility (blaming) and whether they sought redress (claiming) (Felstiner & Ors 1980-1981). It also considered the participants' perceptions of their employers/managers and how power disparities added to their reluctance to escalate disputes. This article shifts the focus from the participants' decision to seek legal recourse to the constraints they encounter in accessing justice. It examines how the participants' expectations of how their experiences would be recognized within legal processes influenced their decisions to pursue avenues of redress. It draws on intersectionality (Crenshaw 1989; Crenshaw 1991; Cho & Ors 2013) as a theoretical lens to examine the participants' responses as well as Sandefur's understanding of access to justice. While intersectionality theory highlights how factors such as race and gender (Crenshaw 1989) interact to shape experiences of oppression, Sandefur's approach to access to justice illuminates how inequalities affect individuals' ability to pursue formal processes (Sandefur 2008; 2009; 2010; 2019; Sandefur & Burnett 2023). Together, these approaches provide a means to examine

how the participants perceived their harms and how inequalities acted as barriers to seeking recourse.

The structure of the article is as follows: section [B] sets out the methodology used in the study (Ahamed 2025a) and this article. Section [C] provides an overview of Sandefur's notion of access to justice. Section [D] examines the study's findings through Sandefur's understanding of inequalities (Sandefur 2008; 2009; 2010; 2019; Sandefur & Burnett 2023) to demonstrate how forms of disadvantage constrain the participants' ability to seek redress. For the purposes of this article, access to justice is understood as the ability to seek and pursue redress for workplace sexual harassment and the factors that facilitate or impede it.

[B] METHODOLOGY

One of the purposes of the study (Ahamed 2025a) was to examine Black women as individual "subjects" who articulate their own reality and experiences, while recognizing that they belong to a wider social group. This is because, "it is as subject, one comes to voice" (hooks 1989: 42). In centring the participants' voices as individuals, the study was able to capture how they each made sense of their experiences because, as bell hooks observes, it is "as subjects, people have their right to define their own reality, establish their own identities, name their history as objects" (hooks 1989: 42).

The study did not homogenize the experiences of the participants, argue for a monolithic understanding of their identities or essentialize their experiences on the basis that they are connected by a shared racial identity (Lorde 1982: 226). In line with Audre Lorde's notion that Black women "were different" and that their "place was the very house of difference rather than the security of any one particular difference", the study acknowledged "the very house of difference" that Black women occupy, the diverse ways in which they were sexually harassed, and what shaped each woman's decision to seek redress (Lorde 1982: 226).

The study drew on Kelly and colleagues' (1996) view that women's identities are informed by the combined aspects of their experiences along a continuum, rather than being reduced to binary categories, sequential identities, or a linear journey from victimhood to survivorhood. The participants were recognized as having identities beyond their experiences of sexual harm. This included having full embodiment and acknowledgment of their capabilities and of the factors they considered important when deciding on whether to seek recourse. The study adopted

the view that the participants "are all far more than what was done to [them]" (Kelly & Ors 1996: 96).

The study drew on intersectionality to uncover the participants' understandings that may otherwise have remained obscured (Ackerly & True 2020). It adopted Leslie McCall's intra-categorical approach (McCall 2005) to highlight the heterogeneity within the group.[1] This lens revealed the interconnected nature of the participants' intersectional identities and enabled their perceptions of seeking redress to be drawn out. The intra-categorical approach further allowed identity markers like race and gender, as well as aspects such as body shape and skin tone, to be considered. It highlighted how power structures in the workplace resulted in specific dynamics between the participants, and their supervisors, perpetrators, and co-workers which in turn shaped their understandings of their harms and willingness to seek legal remedy. One limitation of the methodological approach was that it did not take into consideration the perspectives of employers, human resource managers, and trade union representatives (Ahamed 2025a).

For the study, data was drawn from semi-structured interviews conducted as relatively informal conversations to foster openness and reflection. The interviews took place during the Covid-19 pandemic between November 2020 and February 2022 and the fieldwork was adapted to accommodate lockdown and mandatory social-distancing measures (Teti & Ors 2020). The pandemic brought renewed attention to the limits and scope of traditional fieldwork approaches (Günel & Ors 2020). To take these into account, Gökçe Günel and colleagues' patchwork ethnography approach, which combines "home" and "field" and reconceptualizes research as a "collaborative" process while recognizing the partial and negotiated nature of knowledge production, was adopted. This allowed for the challenges of the pandemic to be negotiated while preserving the integrity of the research. The approach also conceptualized the use of fragmented data, ensuring that context was preserved in ways comparable to traditional fieldwork methods. At the same time, the effect of the shifting social context of the participants' knowledge production was also explored. Further, the study drew on a broad source of information to capture the dynamic nature of the topic while maintaining the depth and contextual richness associated with traditional fieldwork practices (Günel & Ors 2020).

[1] McCall argues that adopting an intersectional methodological approach enables the ongoing processes through which identity categories are constructed, perpetuated, and challenged within the realm of everyday life to be examined. For further discussion, see McCall (2005).

The interviews were conducted via Microsoft Teams with 15 Black women who had been sexually harassed at work, eight lawyers specializing in anti-discrimination law and three activists working in sexual harassment.[2] This participant pool emerged from individuals who were able to identify and articulate their harm experiences as sexual harassment and the study is therefore shaped by a self-selection bias. The participants are distinguishable from Black women who may have suffered workplace harm, but who found their experiences difficult to articulate, or were unable to recognize their encounter as sexual harassment. The generalizability of the findings, therefore, is limited, as it excludes subtle, cumulative or insidious experiences of harm that are less easily named (Ahamed 2025a). This demonstrates the need for future research to examine the normalization of harm and the ambivalence of women to recognize and name sexual harassment. The limitation of self-selection, however, does not diminish the study's significance in highlighting the reluctance of Black women to seek redress for their harms.

The recruitment process for the interviews posed three main challenges which were dealt with in detail in the study (Ahamed 2025a) and mentioned briefly here. First, the potentially distressing nature of the research topic made recruitment of participants more difficult. To protect participant confidentiality, identifying details in testimonials were anonymized using square brackets. Participants were asked to choose their own pseudonyms, including abbreviations. Second, because many women were working from home during the pandemic, they had to balance their professional lives with domestic responsibilities which put more pressure on their time. This initially limited possible participants, but when Covid-19 measures became more relaxed, engagement improved. Third, as recruitment occurred through social media platforms and direct outreach to law firms and barristers' chambers, there was a fear that potential participants outside these settings could have been excluded. To counteract this, the research aims were publicized through organizations supporting Black women with experiences of sexual abuse which resulted in interest from a further three participants. While these issues informed the recruitment process, they also enabled a more nuanced understanding of the participants' decisions to seek redress for their harms and the barriers they encountered. These are explored in the sections below.

[2] Ethical approval to carry out these interviews and permission were granted by the Social Sciences and Arts C-REC, University of Sussex [ER/NA463/1] [ER/NA463/2] and [ER/NA463/3].

[C] SANDEFUR'S UNDERSTANDING OF ACCESS TO JUSTICE—AN OVERVIEW

In Sandefur's perspective of access to justice, the obstacles that individuals encounter when pursuing legal and law-like institutions are acknowledged (Sandefur 2009; 2019; Sandefur & Burnett 2023). Her approach is consistent with scholarly studies that highlight the need to expand and equalize access to justice (Cornford 2016). She argues that one possible pathway to this is through formal institutions of remedy, such as tribunals and lawyers (Sandefur 2008; Sandefur & Ricca 2024). She suggests, however, that access to justice ought also to include non-legal formal institutions, such as CABx (Sandefur 2008; Sandefur & Denne 2022) and evidenced-based people-centred services (Sandefur & Ricca 2024). Widening access to justice in this way broadens its scope, allows for the inclusion of a wider range of individuals and also consideration of a more diverse scope of issues (Gabbay & Ors 2020).

Sandefur's research draws attention to the effects of cost disparities and resource allocation on individuals and their assessment of their legal needs (Sandefur 2008; Sandefur & Denne 2022; Sandefur & Burnett 2023; Sandefur & Ricca 2024). She examines how identity factors such as race and gender influence the nature and quality of justice afforded. She argues that an individual's understanding of the legal system and their willingness to seek redress are closely tied to their expectations of fair treatment within judicial settings (Sandefur 2008). Her approach also considers whether problems are resolved independently, through support from friends, family or other informal sources of assistance (Sandefur 2019). While Sandefur writes predominantly within the United States context, her perspective is relevant to England and Wales and to the study (Ahamed 2025a) because she takes into account aspects of an individual's identity as an axis of social and economic inequality and considers how these inform a willingness to pursue access to justice (Sandefur 2008; Sandefur 2019; Sandefur & Burnett 2023; Sandefur & Ricca 2024).

However, Sandefur's view (Sandefur 2008; Sandefur 2019) has been critiqued for obscuring challenges that obstruct an individual's engagement with the legal system, including its manipulation by male perpetrators of violence to advance their own power (Magnus & Donohue 2022). Accordingly, there have been suggestions that access to justice should be expanded to accommodate a more multi-layered understanding that prioritizes the safety and challenges of individuals including domestic abuse survivors who face such barriers (Magnus & Donohue 2022). While

acknowledging this critique of Sandefur's approach, the study enabled an intersectional examination of the barriers in accessing justice encountered by the participants in the study to be foregrounded. It also allowed an in-depth consideration of how workplace power disparities influenced participants' decisions to seek access to justice (Ahamed 2025a).

In her analysis of the access to justice literature, Sandefur (2008) categorizes three ways in which inequality may persist. These are helpful in understanding the barriers that participants faced when seeking redress. The inequalities identified informed her subsequent research and evolving understanding of constraints (Sandefur & Denne 2022; Sandefur & Ricca 2024). These insights help illuminate the factors that affected the participants' decisions on whether to seek redress.

Sandefur's first way pertains to how individuals behave when confronted with legal issues. The second classifies an aggrieved individual's understanding about justice, and their views about fair treatment, which in turn influences the pursuit of a particular course of action. The third points to how some problems are recognized by law, others partially and others overlooked entirely (Sandefur 2008). In this context, the study makes two principal contributions to the access to justice empirical literature. First, it refines Sandefur's understanding of resources by identifying internal grievance procedures as organizational resources whose use is shaped by power relations interacting with the participants' intersectional identities; second, it demonstrates how the participants' perceptions constrain their pursuit of formal avenues of redress (Ahamed 2025a).

[D] SANDEFUR: RESOURCES AND COSTS

Sandefur's first classification of inequalities sheds light on how individuals behave when they are constrained by resources and costs (Sandefur 2008). In considering whether to seek legal advice, Sandefur found that costs were not a significant barrier. Rather, individuals did not pursue help because they lacked confidence in a lawyer's ability to resolve their problems (Sandefur 2019). She also found that individuals preferred to cope on their own or with the help of friends and family (Sandefur 2019).[3] In line with Sandefur's research, the findings of the study showed that financial resources played a less prominent role (Ahamed 2025a). Only one participant, Luna, referred to "money" as a constraint when

[3] Research in England and Wales further indicates that the distribution of resources and knowledge, including legal, social, and financial, to which individuals have access also shape these decisions. See also JUSTICE (2019); Busby & McDermont (2020).

contemplating whether to seek legal assistance. Participants GMR and Patti relied on advice from their friends. Participant Anya "told a few friends" and her "partner" about the incident. Similarly, participant Penny explained that, although she shared her sexual harassment experiences with her workmates, she "didn't want to sit through a tribunal and sit with a lawyer and have to rehash everything". The findings revealed that the complexity of the participants' decision on whether to get legal advice was also attributed to how they assumed they would be racialized by lawyers. For instance, participant GMR explained that she felt that because she was Black, "nothing would have been done". She elaborated:

> Black people in society are already looked down on, but for Black women it's even worse … I feel like we're such a vulnerable group, like it's a minority within a minority and there's no point. I think nothing would have been done. When it happened, it's so embedded in my head anyway, that if this happens, you know, brush them off and get on with your day. In my head it was if I brought this up legally or continued it, it would be wasting everybody's time.

Her testimony was echoed by participant barrister Geraldine, who, based on her experience in advising Black women, found that many were reluctant to speak to lawyers because they "were so ready to assume that no one was going to believe them". These findings contribute a more nuanced understanding to Sandefur's view of access to justice by demonstrating the significance of how perceptions of legal response intersect with identity to shape receptiveness to engage with formal and non-formal avenues of support (Ahamed 2025a).

Access to legal resources—the role of CABx in providing information and resources

Within the context of Sandefur's first classification of the ways in which inequalities perpetuate (Sandefur 2008), organizations, such as CABx in England and Wales, are of particular significance. They provide an avenue through which individuals access support outside formal legal institutions (Sandefur & Denne 2022). Funded by the Government in England and Wales, their purpose is to offer general legal advice, assist in the preparation of letters, and refer matters to experts (Abbott 1998; Sandefur 2008; Sandefur & Denne 2022). This positions them as a mechanism for improving access to justice by equipping individuals with appropriate information (McDermont 2013). However, Nicole Busby's research (2016) suggests that CABx have been inadequate in addressing matters beyond case preparation, and individuals have been left on their own to navigate their claims. Further, there is evidence to show that, with

increased pressure on them to assist in areas beyond their expertise, fewer solicitors are willing to provide free advice through CABx (Kirwan 2017). While these studies date back almost ten years, the absence of more recent research highlights a gap in understanding how access to adequate legal resources shapes decisions to seek redress in England and Wales.

Participants were asked about their awareness and use of CABx to understand their level of knowledge regarding accessible resources, ability to ask for formal help, and legal competency. The study's findings reveal that none of the participants approached CABx for assistance or information. While eight participants had never heard of CABx, four who were aware of the organization had not considered approaching it, reflecting a disconnect between service provision and perceived accessibility. For instance, participant Sandra said that she had never "thought about it" and participant Luna noted: "I didn't know that I could speak to Citizens Advice in that way." Participant Nola explained: "At that time, I didn't feel like I could really go that far with it, you know. I guess I wasn't equipped to go far in terms of knowledge maybe, and confidence." These findings suggest that unequal access to information and support operated as barriers, further shaping the extent to which participants responded to seeking legal help through formal avenues (Ahamed 2025a).

Organizational resources

Organizational resources such as grievance procedures, which are a mechanism for redress, also play a role in perpetuating inequalities. Sandefur acknowledges that grievance procedures may "cool out" potential claims before they reach the legal system (Sandefur 2008: 350). She does not, however, address how power disparities affect their use and outcome. The study's findings therefore refine Sandefur's understanding of resources and highlight that, although grievance procedures were available to participants, the interplay between power dynamics and their intersectional identities deterred them from using them. A grievance procedure is the first formal avenue through which an employee can seek recourse. An employee is required to resolve their grievance through this process before escalating it beyond the workplace.

In England and Wales, the body that governs workplace disputes and offers resolution resources is the Advisory Conciliation and Arbitration Service (ACAS).[4] It recommends that a complaint be raised through a grievance procedure to increase the likelihood of resolution. ACAS is able to offer assistance only if a dispute cannot be resolved internally and an

[4] See ACAS.

Employment Tribunal (ET) claim can only be pursued as a final recourse. The study's findings revealed that, although eleven participants raised grievances, none went on to file a complaint with ACAS and pursue an ET claim. These findings should be interpreted in light of the potential for selection bias as Black women whose grievances or claims were addressed in the workplace may have been less likely to volunteer for participation in the study.

The testimonies also show how various forms of power disparities shaped the trajectory of the participants' complaints within the workplace (Ahamed 2025a). Frank Dobbin and Alexandra Kalev (2019) point out how organizational power relations influence grievance procedures in practice. Building on their research, Anna Bull and Erin Shannon's study (2024) in England and Wales notes that women managers may have a beneficial effect on women raising complaints. However, participants' accounts in the study suggest that the presence of women in positions of authority did not invariably result in more supportive responses. This is illustrated by participant Patti's testimony about what occurred when she raised an informal complaint with her female supervisors about being groped by a "letchy" security guard. She recounted:

> They said nobody would believe me. Basically, it was a very male dominated field. So, my immediate supervisors were women, but after that, they were just men. And what they were basically saying was that, that they get it, and it's horrible, but if I were to report it, men wouldn't get it and it would just make things more difficult for me at the [public venue].

Her testimony illustrates how organizational authority was used to discourage her from pursuing her grievance. Patti's female supervisors expressed doubts that the senior male managers would understand her experience. They told her that "men wouldn't get it" and would "make things more difficult". By demonstrating that the interaction of gendered and hierarchical workplace power relations with participants' intersectional identities constrains their ability to use grievance procedures, this finding refines Sandefur's understanding of the significance of resources in perpetuating inequities (Ahamed 2025a).

The findings additionally reveal that power disparities have a significant influence on how grievances are addressed. In particular, the "practical authority" that the employer derives from the employment contract (Collins 2018: 56) enables them to exert influence over their employees. Specifically, the employer's power to direct the employee's work is an expression of the subordinate nature of their relationship (Collins 2018). This creates an imbalance which employers manipulate to influence

the grievance process. Participant Pooja recognized that organizational interests could affect how complaints are handled and resolved. She observed how workplaces "want to be predictable in terms of outcomes". Participant Chris shared an example of this relating to when she raised a formal grievance in the religious organization where she worked and also where the "perpetrator's Godfather" was appointed to carry out the investigation. The church's choice of investigator reveals how it used its practical authority to exploit its "broad" discretionary power (Collins 2018: 56) to influence the outcome of a grievance. When Chris complained about the prejudiced "Godfather['s]" review, the pastor said that she "didn't have a right to determine who was investigating". Chris believed that the institution had "picked a side" and intended to "support a man" instead of her. Her experience echoes Sara Ahmed's notion of collegiality in grievance processes and how it can protect those who are regarded as their own, or "the same kind" (Ahmed 2021: 196). The finding reveals how male solidarity, including through support of women, can undermine and thwart the efficacy of internal complaints mechanisms (Ahamed 2025a).

Participant Chris also noted there was an expectation that Black "women shouldn't be outspoken, women should be quieter". Her testimony provides an insight into her belief of how Black men perceive Black women; that, especially within a church setting, Black women ought to be deferential and accommodating. It further highlights the interplay between racialized and gendered expectations and how power can be exploited to maintain silence.

Together, these testimonies reveal how silence is perpetuated through the interaction between gendered and hierarchical power relations and participants' intersectional identities. The findings also demonstrate that these power relations have the ability to discourage complaints being raised, contribute to their suppression, and shape their outcome. In this respect, the findings of the study (Ahamed 2025a) refine Sandefur's understanding of resources and reveal how the interplay between workplace power and participants' intersectional identities can constrain the effective use of internal grievance mechanisms.

Sandefur: the individual's awareness of their rights

Sandefur's second categorization of inequalities sheds light on the significance of an individual's awareness about their rights (Sandefur 2008). Research suggests decisions about enforcement of rights are determined by factors such as an individual's familiarity with the judicial system, their confidence in navigating it, and their perception

of whether the process will deliver an equitable outcome (Balmer 2013; Equality and Human Rights Commission 2016; Balmer & Ors 2023). The findings in the study, however, diverge from this (Ahamed 2025a). Although 11 participants were broadly aware of their rights, they chose not to seek redress. For example, participant Chris "knew her rights", and participant Elaine remarked that some Black women "are very well aware of their rights but may well take a conscious decision not to enforce or exercise those rights". These findings refine Sandefur's (2008) insights by demonstrating that, where overlapping forms of disadvantage rooted in identity shape decisions to seek justice, an awareness of rights does not necessarily lead to legal action.

Sandefur's framing of inequalities also highlights how decisions to pursue redress are shaped by an individual's perception of fairness and the extent to which legal systems are viewed as capable of responding to their experiences (Sandefur 2019). In England and Wales, ETs are the primary platform to pursue workplace sexual harassment claims. Consequently, participants' perceptions of how they might be received within these legal settings formed an important aspect of the study (Ahamed 2025a). The findings reveal two main reasons why participants chose not to pursue their claims through the ETs. The first concerns their expectations in relation to whether judges would treat their complaints fairly. The second relates to the participants' perceptions of how judges would assess the credibility of their complaints. The following discussion examines these factors in turn.

Fair treatment

Sandefur's work demonstrates how an individual's perception of fairness of legal institutions influences whether they pursue formal avenues of redress (Sandefur 2008). It aligns with Lisa Webley's understanding that judgments are shaped by structural norms and expectations embedded in the legal system (Webley 2017), and sheds light on why participants perceived judicial responses as potentially shaped by racialized and gendered assumptions. Webley (2017) further notes that many cases demonstrate how women are discriminated against by a judicial system historically structured by men to serve male interests. While her argument arises within the realm of family law, it is significant within this context because it demonstrates how judges are socialized within a system that privileges male perspectives and informs how women perceive fairness.

Building on this theme from another perspective, participant Patti believed that, since men "have never really been in a situation where

there is systematic targeting of them", they are unable to create "tools" to "actually deal" with women's harms. Closely connected to the issue of male judges, participant barrister Emily observed that Black women had a particular view of white male judges which they believed placed them at a disadvantage. She explained that Black women were likely to say, "these people don't look or sound like me, they're not going to get me, am I really gonna get justice from these people?" This gives insight into how the question of identity shapes Black women's perceptions of whether white male judges could understand and respond to their harm. These findings build on Sandefur's research by demonstrating how understandings of judicial fairness were shaped through participants' views of their own identity as well as their perception of judges.

Since the completion of the study (Ahamed 2025a), the coming into force of the Worker Protection (Amendment of Equality Act 2010) Act 2023 has inserted section 40A(1) into the EqA, imposing a positive duty on employers to take reasonable steps to prevent workplace sexual harassment.[5] This is enforceable by the Equality and Human Rights Commission. However, judicial scrutiny of the employers' compliance with this provision is not freestanding. The ET's consideration of the preventative duty is contingent upon first finding a breach of section 40.[6] If it finds the employer's duty to take reasonable steps has not been discharged, then the ET may order a maximum uplift of 25% to the compensation awarded in respect of the sexual harassment claim (Worker Protection (Amendment of Equality Act 2010) Act 2023, section 124(4)(b)). The introduction of a preventative duty of care is an important legislative development. Where sexual harassment occurs, however, the practical significance of the provision may be limited if employees remain reluctant to pursue legal redress because they believe judges and lawyers may not recognize or understand their experiences or be influenced by their assumptions.

Perception of bias and access to justice

The *Equal Treatment Bench Book* (Judicial College 2024) recognizes the importance of avoiding assumptions about individuals based on presumed characteristics associated with a particular ethnic minority group. Kimberlé Crenshaw (1992) notes that Black women's accounts of sexual harassment are often met with heightened scepticism and shaped

[5] The *Explanatory Notes* state that what constitutes "reasonable steps" will depend on the circumstances of the employer, including its size and sector. The notes explain that an employer's practices and procedures for preventing and responding to sexual harassment, including grievance and reporting procedures, are likely to be relevant: *Explanatory Notes to the Worker Protection (Amendment of Equality Act 2010) Act 2023* (Commentary on Section 1).

[6] Ibid paragraph 23.

by assumptions regarding credibility. This observation is significant in the context of the study (Ahamed 2025a) because participants anticipated that, because they were Black women, their complaints would be subjected to increased judicial scrutiny which deterred them from pursuing redress through the ET.

Participant Chris illustrated in her testimony how the perception of racial and gendered biases influenced Black women's experiences of engaging with the legal system. She said that, based on the assumption of judges' "predisposed ideas", Black women were often prevented from approaching cases on an "equal footing". She explained how it was usually a case of: "it is because very much her character is put in the way, that you caused this …". According to Chris, Black women believed they could be subjected to greater scrutiny regarding their credibility when pursuing redress and this undermined their confidence in legal processes and influenced their willingness to seek recourse through the ETs.

ETs may also form preconceived judgments about a claimant's character based on how they present themselves in court which may also influence the inferences drawn (*Laing v Bury & Bolton Citizens Advice* 2022). However, participant barrister Sarah observed that diversity on the tribunal benches made them "better equipped" and less likely to rely on racialized and gendered assumptions in their assessments. Similarly, participant solicitor Sally stated that there was "a lot of pressure on judges to refrain from having that preconceived idea of what a typical Black woman is". Participant barrister Emily observed that Black women:

> have a feeling that they're not going to be believed. And that's where I think it's not just necessarily the fact of being a woman. It may be this intersectionality I'm referring to, where it's both a woman and being Black.

In her view, the inclination among Black women to feel that they were not going to be believed stemmed from the assumption it was because that they were "both a woman and Black". Their sense of anticipated disbelief captures how gendered and racialized bias converge to undermine credibility. It also provides a bridge to a broader social narrative about belief and recognition—particularly those captured in activist movements such as #BelieveHer and "Believe Women", which foreground solidarity with women who feel that they have been or will be discredited by the legal system (Srinivasan 2022).

Part of the *Equal Treatment Bench Book*'s purpose is to increase awareness and provide guidance about the varied circumstances of individuals appearing in tribunals. It requires judges to be mindful of the

perspectives of Black individuals and the disadvantages they face (Judicial College 2024). Despite such efforts to increase judges' understanding, the testimonies of participants Chris and Emily suggest that they believed that judges would give less credibility to Black women's allegations, and that their grievances were likely to be discredited based on biases and preconceived views about Black women. This complexity is compounded by additional identity aspects which emerged as negatively shaping the Black women's beliefs about themselves, and how they anticipated they would be viewed by lawyers and judges which in turn affected their understanding of their harms and their decisions about whether to pursue redress.

Skin tone and access to justice

Colourism operates as another barrier to seeking redress. Participants noted the significance of their skin tone as evidence in how differing shades of Blackness shaped their assumptions of how they are likely to be treated by the legal system. Participant Chris pointed out that, "as a dark-skinned woman, I know not to expect justice" and "the darker you are, the less likely you are going to receive justice". Her remarks suggest that colourism shaped how she assumed her complexion would be a consideration factor for judges when awarding her "justice". In contrast, participant Mandy described herself as a "light-skinned Black woman". She believed her lighter skin tone contributed to the Head of Police referring to her as a "little minx". While the participants' reflections on their skin tone are subjective, they offer an insight into the social meanings attributed to colour (Monk 2015) and the possibility of colour-related inequality in the legal system. Chris and Mandy's perceptions, however, may not accurately reflect how they are seen by others. It is possible that their previous experiences of discrimination informed how they understood the significance of their complexion. Taken together, however, these findings reveal that the participants' decisions to seek redress were shaped by understandings of themselves as Black women. This included concerns that racialized and gendered assumptions would influence judicial responses. These beliefs, alongside the anticipated lack of recognition of harm and undermined confidence in the legal system, deterred them from pursuing formal avenues of redress.

Sandefur: the extent to which problems are recognized by the law

Sandefur's third way (2008) of classifying how inequalities perpetuate relates to the extent to which certain kinds of problems are addressed by law, while others remain partially acknowledged or completely unrecognized. Its importance lies in drawing attention to how legal recognition shapes access to justice. Within the context of the study, the overlapping harms rooted in identity aspects that are insufficiently acknowledged by law is particularly relevant given the absence of intersectionality in the anti-discrimination provisions of the EqA, which is the primary legislation governing workplace sexual harassment claims.

The inclusion of section 14, which provides for combined direct discrimination protection based on two protected characteristics, prompted debates and lobbying by women's organizations (Squires 2009). Although enacted, section 14 never came into force on the basis that existing discrimination provisions provided adequate protection (Robinson & Ors 2021). The decision implied there was no evidence to suggest that a legal vacuum existed[7] and that widening the law would be onerous to businesses (Hepple 2016). The non-commencement of section 14 has meant that an express statutory recognition for intersectional discrimination has not been realized.

Participant solicitor Jess referred to this when discussing the definition of sexual harassment and explained that, although the definition in the EqA is "broad" and "captures, in a lot of ways, women's experiences", it is "never understood within an intersectional framework". She elaborated: "It doesn't really acknowledge the fact that sexual harassment intersects with race and that Black and minoritised women experience, you know … racialised sexual harassment. It's just not mirrored in legislation." This limitation has implications for access to justice as it narrows an individual's ability to bring a potentially actionable claim. If section 14 were to come into force, this would be an acknowledgment that identities are complex and multi-faceted, and that certain combinations of characteristics can generate unique experiences of discrimination. Such a balanced, open-textured approach would ensure that, while retaining the EqA's framework analytical potential, it had enough scope to appreciate but not dilute its effectiveness by accommodating the interplay of identity dimensions.

Sandra Fredman notes that "the more a person differs from the norm [single axis discrimination], the more likely she is to experience multiple

[7] See HL Deb 13 January 2010, vol 716, col 547.

discrimination, the less likely she is to gain protection" (Fredman 2005: 14). While she made this observation in 2005, it continues to hold relevance, as the underlying issue of intersectional discrimination remains unresolved. The EqA flattens individuals' identities to a singular dimension such as race or sex and overlooks the ways these aspects shape their particular experiences. The narrowing of identity to single categories in the law blurs the realities of intersectional harm. This was noted by participant activist Veronica who acknowledged that, while it was challenging enough for women to broadly bring claims under the EqA, it was "very difficult for Black women" to seek redress and that: "Black women have a massive struggle." She elaborated: "Because they want you to bring a race case or gender case, well, you know that doesn't work. And you fall out as a woman, and you fall out as Black." Her statement suggests that she perceived Black women as being doubly disadvantaged by the legal system, for their gender and for their race. The absence of any articulation of the connection between intersectional elements exposes a limitation of the EqA's protection against discrimination. This lack of recognition in the law has become a structural barrier to access to justice.

The consequence of the non-commencement of section 14 is that the EqA does not expressly provide for claims based on the intersectional nature of sexual harassment. Section 26 EqA governs workplace sexual harassment and defines conduct by its purpose or effect. It does not specifically address the distinct ways it may be experienced in relation to different identity markers. This legislative gap creates a barrier to recognizing intersectional harm and pursuing redress. The relevance of this gap was reflected in the experiences of participants in the study. The findings revealed that in many instances they perceived that their race, gender, age, as well as their physical characteristics made them susceptible to workplace sexual harms. Solicitor participant Jill clarified that sexual harassment is "never in isolation if it's a Black woman; it's race and sexual harassment combined". Participant Luna, for instance, believed that her "bigger butt" and "kinky" hair led her to being objectified and regarded as "so exotic". She also felt "fetishised … as a younger Black woman" in comparison to her older Black colleagues. Participant Mandy said that as "a light skinned Black woman" she observed that her "skin tone is massively sexualised". Integrating intersectionality into the EqA would narrow the gap and require ETs to consider how different aspects of an individual's identity interact in shaping their experiences of discrimination. This would allow a more nuanced recognition of the resulting harm.

Case law suggests that judges have to varying degrees recognized the intersectional dimensions of discrimination rather than adopting strictly essentialist approaches (see *Bahl v Law Society* 2004; *Miriam O'Reilly v BBC* 2010; *Hewage v Grampian Health Board* 2012). Cases in the lower tribunals have demonstrated an understanding of intersectional discrimination. The decisions in *Bahl* and *Hewage*, however, suggest that the higher courts are hesitant to uphold a claim on the grounds of intersectional discrimination. Although case law may be relied upon to provide guidance on how the law should be interpreted, integrating intersectionality into the anti-discrimination statutory regime of the EqA would require judges to acknowledge its significance when analysing a case. The law can then begin to respond to the distinct challenges of intersectional harms by recognizing how different aspects of an individual's identity contribute to their experience of harassment.

[E] CONCLUSION AND FUTURE RESEARCH

This article examines selected findings from the study through an intersectional analysis of Sandefur's understanding of access to justice, focusing on how inequalities act as barriers to seeking redress. The findings relating to grievance procedures refine Sandefur's first categorization of inequalities in relation to the effective use of resources. The findings further demonstrate that grievance procedures can be understood as resources whose use is shaped by the interaction between power disparities and different aspects of participants' identities. Significantly, this interplay deters participants from raising complaints and suppresses the grievance process and its outcome. The findings also reveal that legal advice and formal avenues of redress need to be understood through the lens of participants' perceptions of how lawyers and judges will recognize and interpret their harms. The participants' self-perceptions, their assumptions about judges regarding their credibility, inadequate recognition of their harms and biases about their race and gender shape their decisions not to pursue redress.

The failure to integrate an intersectional framework into the legislative framework of the EqA raises questions about its ability to recognize and respond to intersectional harms. Over two decades after Bahl (2004) and in the absence of section 14, the courts are tentative in their approach, and it remains uncertain to what extent intersectional analyses will be integrated into judicial decision-making. The effect of this is to constrain individuals from accessing justice from the outset. More broadly, it asserts the necessity of acknowledging recognition as a precondition of access to justice. If intersectional harms remain insufficiently acknowledged by

the EqA, then access to justice will remain a pipe dream. Incorporating intersectionality into the EqA means that judges would be bound to consider it in their decisions. This would lead to a more nuanced appreciation of intersectional harms and ensure judgments are more responsive to the lived realities of individuals.

The findings raise several questions about the relationship between recognition and access to justice that warrant exploration. Participants' decisions to seek redress are shaped by concerns that their experiences of harms, rooted in their identities, will not be adequately recognized or appreciated by lawyers and judges. Future research could examine the extent to which legal recognition influences the likelihood of engagement with ETs and legal actors, and the ways in which lawyers, judges and employers understand intersectional harm within the context of resolving sexual harassment claims in and outside of judicial settings. Comparative research across jurisdictions could also provide insights into whether individuals in jurisdictions that afford greater recognition to intersectional harms experience similar barriers to redress. Further, comparative studies involving Black and white women could provide insight into the extent to which race shapes perceptions of credibility, recognition and access to justice. Research could also be carried out with other groups, including disabled women and trans and non-binary individuals. Such studies would contribute to the developing understanding of the role that recognition plays in seeking redress for intersectional harms.

About the author

Dr Neemah Ahamed *is an academic at Manchester Metropolitan University and a socio-legal researcher whose work explores discrimination law and access to justice through an intersectional feminist lens, with a focus on how identity shapes experiences of harm and responses to it. Her PhD in Law at the University of Sussex examined workplace sexual harassment affecting Black women in England and Wales and the structural and legal barriers they faced when seeking redress.*

She is dual-qualified as a solicitor in England and Wales and an Advocate of the High Court of Kenya. Her research is particularly concerned with the gap between formal legal rights and people's ability to recognize and pursue remedies for injustice.

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Special Section: Queer Judgments—Part 2, edited by Alex Powell, Yerram Behara & Joanne Stagg, pages 24-150†

Queering Guardianship: Moving Parenthood from Status to Care in *Githa Hariharan v Reserve Bank of India* (India)

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Abstract

In *Githa Hariharan v Reserve Bank of India* (1999), a provision of the Hindu Minority and Guardianship Act 1956 was challenged before the Supreme Court of India on the ground that it violated the constitutional guarantee of equality since it stated that the father is the "natural guardian" of a minor, and the mother comes "after him". The Supreme Court held that "after" does not mean "after the death of the father" but rather "in the absence of" the father, including situations where the father is unwilling, incapable, indifferent, or has abdicated responsibility. This holding, however, ironically reiterated the primacy of the father over his children's guardianship and remains the position of law to date. This rewritten judgment re-imagines the case from a queer lens. It highlights the problematic prevalence of the father/mother binary within parenthood laws in India, contests the assumption of a bionormative parental unit, and refutes the idea that guardianship should flow from gendered parental roles. It illustrates how Indian constitutional law has long had the tools to "queer" guardianship and that courts often choose interpretive restraint, not because of doctrinal limits but because of a failure of moral imagination regarding essentialized gender identities and the gendered division of labour. The rewritten judgment envisions an alternative, relational conception of guardianship centred on actual decision-making and caregiving.

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† For the first part, see *Amicus Curiae* 7(1) (2025) 133-339, Special Section: Queer Judgments.

This affirms equality between heterosexual parents while creating space to recognize same-sex parents, non-biological caregivers, and trans parents whose legal gender does not map onto mother/father, and chosen-family structures.

Keywords: guardianship; mother; father; equality; caregiving; discrimination; gendered parental roles; bionormative.

[A] INTRODUCTION

Is only a father a capable guardian of a child? The Supreme Court of India implicitly answered this in the affirmative in *Githa Hariharan v Reserve Bank of India* (1999). A guardian is "a person who has the legal right and responsibility of taking care of someone who cannot take care of himself or herself" (Cambridge University Press (CUP) nd), a duty that lies primarily with parents. Yet, the Court affirmed the rule of preference in section 6(a) of the Hindu Minority and Guardianship Act (HMGA) 1956, which gives "fathers" priority over "mothers" as natural guardians of a minor boy or unmarried girl. A three-judge bench upheld the provision by reading "father, and after him, the mother" to mean "father, and in his absence, the mother"—an interpretation it believed gave both parents equal say and did not offend the constitutional guarantee of equality and non-discrimination.

In this article, we imagine the case reaching the Supreme Court in 2026, and we decide it along with the rest of the original judges by rendering a dissenting opinion. In line with the Queer Judgments Project (Ferreira & Ors 2025), we queer the concepts of mother, father, motherhood, and fatherhood within Indian law and hold that guardianship *vis-à-vis* parenthood should be based on what a parent does, rather than who a parent is, or their gender or sexual identity.

Our rewritten judgment references Indian jurisprudence till date and adopts a critical queer method (Fischel 2019). Such a method does not proceed from a pre-decided ideological position but interrogates how ideas of mother, father, motherhood and fatherhood are constructed, disrupting established cis-hetero-patriarchal norms. Methods are queered when we use the tenets of queer theory to tweak or explode what is possible with existing procedures, "making strange the otherwise commonplace; interrogating alternate possibilities for worldmaking and livability; disrupting ideals of stability, rationality, objectivity, and coherence; rethinking empiricism and our assumptions about data; and deconstructing rather than reifying social constructs" (Ghaziani & Brim 2019: 15; McDonald 2017).

Within this method, it is the process that matters: questioning the discursive ideas of heteronormativity, gendered division of labour, and gendered subjectivity that inform guardianship and parenthood, and recasting these from a lens of gender-inclusive and queer-inclusive equality. Judgments in India rarely name their method explicitly, whether standpoint (socialist, feminist, queer, anti-caste) or interpretive (textualist, originalist, purposive, transformative). Our rewritten judgment departs from this general approach by naming a queer method at the outset. While our judgment is written from a savarna gaze, we acknowledge that class and caste significantly influence queer positionalities and queer parenthood, a gap that deserves more attention in the literature generally.

Deciding this issue in 2026, we rely on scholarship produced till date. We follow the Supreme Court that has itself engaged feminist theory, intersectionality, and queer theory in its reasoning (*Navtej Singh Johar v Union of India* 2018; *Lt Col Nitisha v Union of India* 2021; *Patan Jamal Vali v State of Andhra Pradesh* 2021; *Supriyo v Union of India* 2023). Some of our reasoning may meander into general issues of Indian law and society rather than sticking closely to the question at hand; however, this too is not new to Indian judgments. Judges, especially in the Supreme Court, routinely spend pages behaving like academicians before arriving at the actual legal propositions near the end. Even the marriage equality judgment, in both majority and minority decisions, expends its energy across 100s of pages establishing that (a) queer people and queer families are not "abnormal"; (b) queer persons are already in relationships and have families with children, and how lack of legal recognition affects them; and (c) varied forms of discrimination against queer people and families exist in society and law, which needs to be redressed.

Judges have also not shied away from unique ways of writing on queer issues. Justice Kaul, in his marriage equality dissent, referenced a Jon Bon Jovi song; Justice Anand Venkatesh of the Madras High Court, in a *habeas corpus* petition of a runaway lesbian couple, attached his own therapy report, having sought counselling from a queer-affirmative counsellor to better understand LGBTQIA+ perspectives before adjudicating. Such judgments draw comprehensively on petitioners' anecdotes, stories of queer and alternative families, and news reports and academic pieces chronicling lived realities. Our queer judgment, which incorporates these sources too, is part of this tradition.

With this opinion, we hope the Court displaces any weight given to the gender identity or sexual orientation of the parent for the purposes of guardianship, and instead asks whether they are fulfilling the responsibilities of what it means to be a parent.

[B] IN THE SUPREME COURT OF INDIA

WP(C) No 489 of 1995 and WP(C) No 1016 of 1991

Appellants: Githa Hariharan and Ors & Anr

v

Respondent: Reserve Bank of India (RBI) and Ors

Hon'ble Judges/Coram: Dr A S Anand, CJI, M Srinivasan, U C Banerjee, J, and Anonymous, J.

Githa Hariharan and Ors & Anr v RBI and Ors

JUDGMENT

ANONYMOUS, J (for themself)

1. Having read the judgments authored by the Chief Justice and Justice Banerjee, I regret my inability to agree with the same. While I understand the importance of judicial consensus, I defer to Justice Hughes's opinion (Hughes 1928) on this:

> A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.

2. The question before us is quite straightforward: is section 6(a) of the HMGA 1956 and section 19(b) of the Guardian and Wards Act (GAWA) 1890 violative of Articles 14 & 15 of the Indian Constitution? Since the Parliament amended the GAWA 1890 subsequently in 2010, the lone question surviving is that of the HMGA 1956. The impugned provision states:

> The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—
>
> (a) in the case of a boy or an unmarried girl—the father, and after him, the mother:
>
> Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

3. A literal interpretation—as undertaken by the respondents here—would mean that the mother can be a guardian only "after the lifetime" of the father. Learned counsel for the petitioners argue that the provision provides preference and primacy to the father as

compared to the mother for a Hindu minor and violates Articles 14 and 15 of the Constitution. I believe the petitioners' arguments to be meritorious and detail my reasoning as follows.

4. My sibling judges have upheld the validity of the provision by incorrectly reading "after" as "absence" ie, the mother can be the guardian of a child if and only if the father is absent:

> If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognised natural guardian, can act validly on behalf of the minor as the guardian (CJI Anand, paragraph 10).
>
> "after" does not necessarily mean after the death of the father, on the contrary, it depicts an intent so as to ascribe the meaning thereto as "in the absence of" — be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise and it is only in the event of such a meaning being ascribed to the word "after" as used in Section 6 then and in that event the same would be in accordance with the intent of the legislation, viz. welfare of the child (Banerjee J, paragraphs 46–47).

I respectfully disagree with the reasoning espoused by the majority, since the interpretation continues to facilitate discrimination and perpetuate stereotypes on the basis of gender and sexuality.

[C] *STATUS QUO*: GENDERED DIVISION OF LABOUR WITHIN CHILDCARE IN INDIA

5. There are three propositions which stem from the majority's interpretation and the (problematic) organization of parental rights and obligations in India more generally:

   i. Within the heterosexual marital dyad (which is the natural family form assumed by the law), the father receives predominance over the mother.

   ii. This legal position arises from the conception of the role of fathers and mothers. The fathers are seen to be the breadwinners, the protectors, and the decision-makers. The mothers are seen to be the nurturers, the caregivers, and the ones undertaking the day-to-day rearing of the child.

iii. This gendered division of labour carries through into other statutes as well. Structurally, the woman is cemented as the one mothering the child, whereas the man does not play an active role in social reproduction.

6. Within Indian parenthood and custody law, it has been made clear that fathers are the legal guardians of their children, but mothers have custody of their children, ie, they are expected to perform the day-to-day responsibilities of caring for their children (Law Commission of India 2015; Bajpai 2017; HMGA 1956, section 6; see also GAWA 1890, section 41). The HMGA 1956 recognizes the primacy of the male parent as the one who exercises power over the child. Similarly, in Muslim personal law (Mulla 2012; *Gulamhussain Kutubuddin Maner v Abdulrashid Abdulrajak Maner* 2000), the father is the guardian of the child while the mother has custody up to a certain age. The mother typically is not the guardian of the child in the lifetime of the father. This is compounded by the fact that the concept of joint guardianship by two parents does not exist in India.

7. This form of reasoning that valorizes the mother as the primary carer of children insidiously finds its way into the overall legal ecosystem. While there is a comprehensive maternity leave regime in India, there is no provision for paternity leave as a matter of right for all workers in India. Only fifteen days of paternity leave is available to government servants, which is anyway applicable to less than 1% of India's population. Further, even if we consider this paternity leave, women are entitled to twenty-six weeks of maternity leave and, in comparison, the fifteen days of leave available to this narrow segment of men is shameful. This sends a message that we do not expect fathers to participate in childcare, and worse, implies that it is certainly not their duty to undertake caregiving responsibilities (*Hamsaanandini Nanduri v Union of India* 2026).

8. Such stereotypical reasoning carries through even into otherwise progressive, well-intentioned judgments that cement the rights, or rather, duties of mothers. For example, recently, the Supreme Court affirmed the mother's constitutional right to breastfeed in public (*Maatr Sparsh, An Initiative by Avyaan Foundation v Union of India* 2025) and ordered that rooms with feeding stations and changing tables must be available in all court complexes to cater to nursing mothers and mothers with infants (*Rajeeb Kalita v Union of India* 2025). While these judgments are important and mandate public infrastructure to facilitate childcare, they once again inadvertently perpetuate the long-standing gendered stereotype that infant care

and nutrition is exclusively a mother's responsibility (Balaji 2025). Fathers would not even be allowed into such feeding rooms which are meant only for mothers, thus also making the process of childcare isolating for women. Judgments such as *Maatr Sparsh* (2025) and *Rajeeb Kalita* (2025) are crucial, but they must be accompanied by structural changes enabling paternity leave, father-led care for children, and symbolic messaging that the duty of childcare must not fall solely on women.

9. While the gendered division of labour is problematic within a heterosexual parental dyad, the structure of the dyad itself creates disadvantages to a range of parental units, especially to queer parents.

   First, if mothers and fathers are thought of as performing different functions, this gives rise to the incorrect assumption that you need one of each kind for the complete, holistic development of a child. This jeopardizes the chances of single parents having children by adoption, assisted reproduction, or surrogacy, which is only allowed in a restricted manner in India (PTI: 2020). This is especially so in the case of queer individuals, who can only adopt children individually and not as a couple. Normatively, this claim poses a threat to the claims of joint adoption, assisted reproduction and surrogacy by queer couples as well.

   Second, creating gendered roles within parenting is problematic for men and women who are boxed into certain categories, but there are far more damaging consequences for transgender, non-binary, or gender-fluid individuals who may simply not be legible to the state as parents.

10. The stereotype that fathers are breadwinners and mothers are the caregivers, and that there is a hierarchy between them affects all individuals who wish to be parents, not just heterosexual individuals.

Father	Breadwinner, Protector
Mother	Caregiver, Nurturer
Child	Subject of parenthood

Status quo in law in India.

The problem with this construction is that when it is embedded into family law, it automatically casts suspicion on any parental unit

that does not look like this. This is because if it was a single mother or a single father raising a child, there is automatically a notion of deficiency attached to such parenting. Because the parent (assuming they are cisgender) would be thought as of only being able to fill either the role of father or mother. Thus, the law would automatically not prefer individual parental units, and this assumption is reflected throughout in family laws in India dealing with parenthood. In India, the Central Adoption Resource Authority (CARA) Guidelines lay down the criteria of persons who can adopt children and the order of priority among them. The Guidelines indicate that even though single men and women can adopt, the ideal parental unit would be the able-bodied, financially well-off, middle-aged heterosexual married couple, who had at least two years of marital stability (Adoption Regulations 2017). Similarly, with respect to surrogacy, it was proposed that only heterosexual, married couples could avail of surrogacy to have a child before severe public criticism. This led later to the inclusion of widows and women divorcees as possible commissioning mothers within the law but did not open it up to other parental units. The implication relating to the unfitness of single parents is normatively problematic, unfair, and does not practically reflect the lived realities of many children in India who are effectively brought up anyway only by a single parent, or even alone by an aunt, uncle, or grandparent.

11. Similarly, with respect to queer parents, the same issue would arise. The Supreme Court of India decided in *Supriyo v Union of India* (2023) that the CARA Guidelines were not unconstitutional for excluding queer parents as prospective adoptive parents. While the Union of India also had moral issues with queer parenthood, one of the arguments they made related to the competence of two male or female parents to raise a child:

> Both the father and the mother have a significant and unique role in the upbringing of children. In non-heterosexual unions, the child born out of surrogacy or artificial reproductive technology or adopted by the couple would feel the absence of either a father or a mother. The State does not grant legal recognition to homosexual unions in the form of marriage to protect the interest of the children. This is a legitimate State interest. The petitioners have not submitted sufficient data to back their claim that the interest of a child brought up by a non-heterosexual couple is protected. (CJI Chandrachud, paragraph 42(j), reproducing the Union's argument).

This is the fear of the state, that a child will either have two fathers who do not provide adequate caregiving, or two mothers who will not be able to provide for or protect the child adequately. Further, since mothers are not assumed to be capable enough to be the legal guardians of their child, this is the outcome imagined by the state:

(No breadwinner/protector)			
Mother 1	Caregiver, Nurturer	**Mother 2**	Caregiver, Nurturer
Child			

(i) If a child has two mothers.

or

Father 1	Breadwinner, Protector	**Father 2**	Breadwinner, Protector
(No caregiver/nurturer)			
Child			

(ii) If a child has two fathers.

This outcome appears unsatisfactory because the child is seemingly deprived of one of the facets of parenthood. However, this is only the case if we assume that men and women are indeed independently incapable of fulfilling the multiple, complex requirements of being a parent.

12. Thus, the reasoning in *Githa Hariharan v RBI* and in the laws relating to parenthood continue to perpetuate stereotypes that harm everyone. Firstly, while the dominant construction ...

Father	Breadwinner, Protector
Mother	Caregiver, Nurturer
Child	Subject of parenthood

... harms mothers *vis-à-vis* being legal guardians of their child, it also harms fathers in custody battles, paternity leave, and generally affects structured opportunities for them to care for their children and spend time with their children. Secondly, this logic harms queer couples wishing to have children. A similar logic regarding gender roles was (and in many places, is) used to delegitimize queer

relationships, as it was inconceivable that two people of the same gender could love each other, be in a relationship and start a family together. Finally, this logic harms single parents. Although the law provides for them to have legal parenthood in a limited capacity (unless it is their own biological child birthed naturally), they will also be thought of as inferior to a heterosexual married couple and are not prioritized in legislations that provide alternative routes to parenthood (adoption, surrogacy, etc).

[D] DECONSTRUCTING MOTHER, MOTHERING, FATHER, AND FATHERING

13. The way to challenge this construct is to challenge the notion of the gendered division of labour. We need to deconstruct the narrative that there is something inherent to parenthood *vis-à-vis* the gender of parents that necessitates a "father" and a "mother". In this regard, let us examine the linguistic and logical construction of "mother" and "father". In the English language, the terms "mother" and "father" are not just nouns. They are verbs as well. (To) *mother* (verb) is defined varyingly as:

    i. "to treat a person with great kindness and love and to try to protect them from anything dangerous or difficult" (CUP nd);

    ii "to care for somebody/something because you are their mother, or as if you were their mother" (Oxford University Press (OUP) nd);

    iii. "to care for or protect like a mother" (Merriam-Webster nd); and

    iv. "If a woman mothers a child, she looks after it and brings it up, usually because she is its mother" (Collins nd).

    Thus, inbuilt into the definition of mother as a verb is the act of caring, protecting, or nurturing another individual.

    On the other hand, (to) *father* (verb) is defined as:

    i. "to become the father of a child by making a woman pregnant" (OUP nd);

    ii. "beget; to be the founder, producer, or author of" (CUP nd); and

    iii. "to procreate or generate (offspring); beget" (Merriam-Webster nd).

    Here, inbuilt into the definition of "father" is to produce, and to beget; the action attached to the verb form of father ends there.

14. Two implications arise in the context of section 6(a) which states that the "father, and after him, the mother" shall be the guardian of the

child. The first is that the mother is always considered subordinate to the father because she has no independent existence in law. Under section 6(a), the mother is *fathered* as a guardian only *through* the father, in his shadow, in his absence. The first step of this test is to always look for a father; the mother is rendered invisible, unbirthed at that point. Only when the father is not there, is absent, is dead, or inept or unable to take care of the child, does the second step kick in—he *fathers* the mother as the legal guardian. The mother-guardian does not exist on her own, she comes into being and is begotten *by* the father. Section 6(a) thus makes the mother's existence logically, chronologically, and discursively conditioned upon the father's existence (actually, the lack thereof). So, within the dyad itself, the positioning of the mother and father is discriminatory because of the hierarchy between them.

15. The second implication is that law considers women as mothers and men as fathers. But is "mothering" something that can only be done by women? Is "fathering" something that can only be done by men? Firstly, the existence of single parents directly challenges this notion. Barbara Risman's seminal article in 1986 titled "Can Men 'Mother'?" based on a research study conducted on a sample size of almost 150 single fathers concluded that:

> Most men did not depend on mother, girlfriend or housekeeper to perform the stereotypically female tasks of cooking or cleaning. Over 80% of all fathers reported that they were personally responsible for the varied tasks of housekeeping. Social-psychological theorists (e.g., Chodorow, 1978) often suggest that a core attribute of mothering, but not fathering, is the ability and desire to develop intensely intimate relationships with young children … [But] in general, these men believe their children share almost all of their emotions … The situational demands of role requirements influence adult behavior and lead men to mother when they have no wives to depend upon. Despite male sex role training, fathers respond to the nontraditional role of single parent with strategies stereotypically considered feminine (Risman 1986: 95-102).

Single fathers represent just the first bastion of the attempt to challenge gendered associations of "mothering" and "fathering". When we study the experiences of queer parents in other jurisdictions and even in India, it is clear that having two parents of the same gender or having parents who are not cis-heterosexual does not in any way present a lack of mothering or fathering. Rather, to put it simply, parents take up the role of being parents (ie, according to the *Cambridge Dictionary* (CUP nd), "to raise a child as their parent"). Timothy Biblarz and Judith Stacey noted that, while in lesbian

couples children seemed to receive a "double dose of motherhood", for the parents themselves, the women took on both the nurturing and the economically providing role—thus fulfilling the presumed role of both the father and the mother. The more important conclusion drawn by the authors in the case of gay fathers is that: "The slim body of research on gay male coparents suggests they do not provide a double dose of 'masculine' parenting. Instead, they also appear to adopt parenting practices more 'feminine' than do typical heterosexual fathers" (Biblarz & Stacey 2010: 3-22).

Anecdotal evidence from queer couples in India suggests the same. In India, before the Surrogacy (Regulation) Act 2021 was enacted, queer couples could have children through commercial surrogacy. Even now, a queer person can singly adopt a child *de jure*, but *de facto* the child may be raised not only by their legal parent but the parent's queer partner as well. Snippets of conversations with queer parents in India break down the association of woman with mother/ing and men with father/ing:

> Sougata and Mayank from Bangalore state, "Two men who had never held infants suddenly learned about feeding, burping, and spent sleepless nights over it … Even relatives who had once been distant began to see us simply as parents, and no different from other fathers and mothers they had known" (Subramanian 2025).

Two sets of gay dads raising their kids in India were interviewed by *India Today*. When asked about the differences between traditional versus gay parenting, they all echoed the same first principle that it is the act of loving the child and not the gender of the parent which matters for parenting (*India Today* 2023).

> "The gender is not so important"; "You know, there is this notion that a mother and father are needed for the child, but many parents in India are brought up by their aunts or grandparents"; and "A child needs a loving set of parents. In our case there are two fathers, but a single mother or a single father and a baby is also a happy family right" (*India Today* 2023).

In Pooja Pande's book *Momspeak*, where she chronicles the stories of mothers in India (queer mothers, hijra mothers, sex worker mothers etc), she speaks to a lesbian couple who jokingly state that one mother is the more "hospitaly one" whereas the other is not (Pande 2020). This shows that perhaps, within queer families, divides can happen along more practical lines such as the "hospital" parent or the more "strict" parent (Bhayana 2026), which are pretty removed from the concerns of the gendered division of labour within parenting.

16. The lines of mothering and fathering are even more blurred when it comes to trans parents. Kate Henley Averett asks:

> When a parent transitions gender, does their parenting transition as well, from "mothering" to "fathering" or vice versa? What role does reproductive capacity play, such as in cases where transgender men carry, give birth to and/or chest-feed their children (Walks, 2017; Lee, 2018), experiences that "[encourage] us to rethink the legal and social definitions of what it means to be a father" (Ryan, 2009: 139)? How do genderqueer and non-binary parents experience their parenting in relation to the binary terms "mother" and "father"? How do their children experience being parented? (Averett 2021: 284-304).

17. There are three interesting cases in India which shed some light on this. The first refers to a divorce in India on grounds of gender dysphoria, as the partner assigned female at birth within the marriage, having birthed two children, being known as their "mother" for the first few years of their life, finally came out as a trans man at the age of 34. Fred says:

> Coming out reshaped every relationship. But the harder question was personal: what about his children? They grew up alongside his transition, supported by family and therapists who explained gender in age-appropriate ways. "They would often correct my parents," Fred recalls. "'Call him Fred. Don't call him daughter.'" Today, his nieces and nephews call him "Fred Papa." His children call him "Appa (father)" (Chandra 2026).

Fred's journey of parenting did not change with his gender identity—he continues to cook, pick his children up from school, play with them, and nurture them in the same ways. Is this mothering, fathering, or neither and something completely unique?

18. The second case is of the hijra mothers in India. The hijra community is a traditional, particular socio-economic trans-feminine presenting cultural community in India. There are several instances of hijra women adopting abandoned children, runaway or excommunicated transgender children, and caring for them in ways that their natal family could not or did not.

A reported interview with a Hijra woman about her hijra guru:

> "Your guru had adopted a child?"
>
> "Yes. A boy."
>
> "Was that what you meant when you called her an 'honest mother'?"
>
> "Yes … One day, a woman walked into our home with a baby boy and handed it over to Rano. It was a baby born out of infidelity. I

> think she knew she wasn't fit to raise a child when she said Yes. After everything you go through as a transgender in this society, you become too obsessed with independence and freedom in the Hijra community here that it is difficult to let go of the self-centered lifestyle and be responsible for another human. But she also knew what she was doing. A homeless child needed affection, and she was financially capable of providing for him. The soft side of her that not many had seen was what brought her to terms with motherhood. She was a proud parent who proved no law could keep a passionate mother away from a child who needed love."
>
> "What happened to the child after [your guru] died?"
>
> "He was taken care of by a sister-chela of mine in the family I sought after Rano was gone … He graduated from university and is a Physical Education teacher today. He is married, and the family lives together in Paharganj. Their home is full of photo albums from his childhood and their memories as a family."
>
> I smiled through tears. Madhuri smiled back.
>
> "It was all because of Rano that an unwanted baby did not meet the disastrous fate of being killed. He is a well-educated gentleman with a happy family: him, his wife, and a Hijra mother." (Gulati 2022).

This further complicates the idea of mothering as not only does it separate the idea of mothering from the biological mother, it further removes it also from the legal parent undertaking the mothering. This kind of love and nurturing of a child arises solely from the bond with the child—in law, the hijra guru will not even be seen as the parent of the child. Does this not say something about *what* parenting is, rather than *who* a legal parent is?

Even within the adult hijra community, which is organized both like a family and a business setup, with inter-generational hierarchies but also teacher–disciple hierarchies, one can observe a matriarchal organization of households. Within the hijra community, members "call one another *nani* (grandmother), *dadnani* (great-grandmother), *mausi* (mother's sister) … or *amma* or *ma* (mother)" (Saxena 2011: 55). "By claiming motherhood, hijras have re-appropriated the gender of the term mother by making it trans-inclusive, third-gender inclusive, and non-binary inclusive" (Goel 2018). Further, the hijra gharana setup also offers a space for the shelter and livelihood of trans children and minors (Patel 2024), which makes it an important institution to consider in the context of guardianship.

19. Finally, the third case is of a trans couple from Kerala (*Zahhad & Ors v State of Kerala* 2025), Zahhad (a trans man) and Ziya (a trans

woman), who had a baby naturally, carried and delivered by Zahhad. The authorities had initially registered Ziya as the father and Zahhad as the mother. They petitioned the authorities to get this changed "due to the unique circumstances where the child's biological mother identifies as 'male' and the biological father identifies as 'female'" (Gahatraj 2023). Upon denial, they approached the court and their prayer was to both be registered on the birth certificate simply as the "parents" of the baby. The Kerala High Court granted them relief, following *National Legal Services Authority (NALSA) v Union of India* (2014) (the Supreme Court judgment recognizing the rights of transgender persons in India) and the consequent Transgender Persons (Protection of Rights) Act 2019, *Deepika Singh v Central Administrative Tribunal (*2022) (where the Supreme Court held that law must be inclusive of atypical families), and *Badshah v Urmila Badshah Godse* (2014) (where the Supreme Court introduced the concept of "social justice adjudication").

> The concepts such as, the transgenders leading a life together as a family as we normally understood, having their own children, getting the names of their children registered under the provisions of the Registration of Births and Deaths Act etc., were something the law makers probably not anticipated at the time of its enactment. Therefore, these are the changes that occurred in the Society, post enactment of Act, 1969, which has got the statutory recognition and also their gender based individual status, identity and rights were upheld by the Hon'ble Supreme Court as well. … If a certificate as sought by the petitioners, advances the welfare, interests and the rights of the petitioners or the class/category they fall in, particularly when their rights originate from the Articles of the Constitution of India, without offending any of the rights of the 3rd parties and without doing violence to any statutory provisions, this court need not hesitate to step in and to issue appropriate directions to issue a certificate to the petitioners (Justice Rahman; paragraph 24).

Here, Ziya and Zahhad challenge the biologically presumed role divisions of a mother and a father.

20. It is very often High Courts in India that act as a beacon of light for even the Supreme Court. We have much to learn from this High Court's approach, as we do from the lives of queer parents themselves. All these examples of parenthood show us that social reality is far ahead of the law. It is now the law's turn to catch up. Especially in alternative families, which are already vulnerable in society, an added axis of vulnerability comes from the lack of legal protection. Further, it might become doubly difficult to address issues of harm

and safety that might arise within these alternative families (Moudgil 2022), unless they are *a priori* recognized by the law.

21. To conclude this discussion, it seems to me that deconstructing mothering and fathering and focusing instead on the action of parenting, when it comes to guardianship, is useful in three ways: (i) it opens the door to gender-neutral references to parents, which matters for trans parents; (ii) it opens the door to the recognition of queer couples and single parents as equally capable parents; and (iii) for the purpose of the case at hand, it supports the conclusion that guardianship should turn on the doing of parenting rather than the being of a parent, ie, supporting the feminist-egalitarian argument that mothers are in no way lesser than fathers and should not be treated as such within the law. Deconstructing mothering and fathering thus directly impacts the legal construction of a "mother" and a "father". Focusing on the care required for a child lets guardianship attach to whoever actually performs the parenting, regardless of a parent's gender or sexual identity. This then helps us answer the issue at hand relating to section 6(a) of the HMGA 1956. Just as gender should not determine parental fitness or capacity for queer and trans parents, it should not determine it for mothers within heterosexual marriages either.

[E] CONSTITUTIONAL VIOLATIONS OF THE EQUALITY GUARANTEE

22. Now that we have taken this reasoning to its logical conclusion, the Article 14 and Article 15 tests below independently confirm this reading, that for the purposes of this case, mothers are in no way lesser than fathers.

Violation of Article 14

23. Article 14 places an obligation on the state not to deny to any person "equality before the law and equal protection of the laws". This translates to treating equals equally, and those who are not equal, unequally. The primary test under Article 14 is the reasonable classification test (*Anwar Ali Sarkar v State of West Bengal* 1952; *EP Royappa v State of Tamil Nadu* 1974; *Association for Democratic Reforms v Union of India* 2024). The reasonable classification test states:

> (i) the classification must be founded on an intelligible differentia; and (ii) the differentia must have a rational nexus to the objective sought to be achieved by the legislation. There must, in other words, be a causal connection between the basis of classification

> of people into different groups with different treatment and the object of the statute. If the object of the classification is illogical, unfair and unjust, the classification will be unreasonable" (per Chandrachud J in *Navtej Singh Johar v Union of India* 2018: paragraph 59).

It is surprising and, at the same time, concerning that both the majority and concurring judgments do not undertake an in-depth examination of the violation of Article 14 and its tests.

24. According to me, section 6(a) creates an unreasonable classification between fathers and mothers, which is not founded on any intelligible differentia. The phrase "father, and after him, the mother" creates a hierarchy between parents based on their gender and affords preference to the father over the mother. The classification herein between parents based on their gender is not premised on any intelligible criteria, as discussed in depth above. Rather, the classification presumes a discriminatory assumption that fathers are better-equipped or, worse, *prima facie* entitled to be guardians than mothers and, thus, must get primacy in the order of guardianship. Further, the majority judgments—by reading "after" as "absence"—subject a mother's guardianship to the indifference of the father who continues to be retained as the "primary" guardian. A woman can thus be considered a guardian, only if men seemingly reject such a role, which is out of her control.

25. Moreover, this classification does not have a rational nexus to the objective sought to be achieved by the legislation. It is imperative to discern the ostensible purpose, that is the purpose claimed by the state and the real purpose that is the true purpose identified by courts. The true purpose behind this provision of guardianship is to ascertain and appoint a "reasonable manager" to administer the estate and take care of a minor's person and property till they are able to do it themselves. This provision can be traced to the colonial times when the British wanted to acquire/manage land and collect revenue from owners who might be Hindu male minors. Guardianship was comfortably "placed at the intersection of three separate notions, i.e., property, education and gender" (Punj & Samarnath 2021).

26. This classification between fathers and mothers has no rational nexus to this objective. Women are as competent as men to administer estates and take care of a minor's person and property till they are able to do it themselves. There can be no argument mounted either questioning the competency or comparing the efficiency between

women (ie, mothers) handling estates or being effective guardians as compared to men (ie, fathers) (Halder 2005). Halder identifies that:

> Following the British regulations for guardianship, these provisions had recognized mother's right to keep custody of the child only when the child was below five years … This had created an impression worldwide that whereas women can be custodians for minors in the pre-puberty age, men must be given the priority for deciding about the welfare of the children when they cross the puberty age (Halder 2005: paragraph 5).

27. This provision reflects patriarchal norms which consider women incapable of acting as decision-makers and rendering male children to be seen as an extension of the paternal family name and wealth. This discriminatory strain has permeated to the reasoning espoused by Trial Courts and High Courts which have denied mothers the right to become the primary custodians of their minor children (*Rosy Jacob v Jacob A Chakramakkal* 1973; *Raj Rani v Subhas Chander* 1982; *Prabhati Mitra v DK Mitra* 1984). It is high time that such a strain is ended by the Supreme Court.

28. The test of "manifest arbitrariness" *vis-à-vis* Article 14 dictates the invalidation of legislation on the ground of being capricious, irrational, without adequate determining principle (ie, if the purpose is not in consonance with constitutional values), or something which is excessive and disproportionate (*Shayara Bano v Union of India* 2017; A*ssociation for Democratic Reforms v Union of India* 2024). This provision lacks an adequate determining principle since it is against the constitutional values of dignity and equality by placing mothers at a secondary level without any reasonable or adequate explanation. Mothers cannot be effective caregivers if they cannot correspondingly legally take decisions for their children. Thus, I hold that the impugned provision violates Article 14. Further, as a matter of general principle, any ascertainment of guardianship merely based on the gender and sexual identity of the individual would be considered a violation of Article 14 as it would be manifestly arbitrary to do so.

Violation of Article 15(1)

29. Article 15(1) states that discrimination cannot take place against any citizen on grounds of "sex". Article 15(1) reads as follows:

> 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

> (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

30. In the case of *NALSA v Union of India* (2014), the Supreme Court has interpreted "sex" to mean:

> Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of "sex" under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity (paragraph 59).

31. There is no set test for direct discrimination in India. Courts have varyingly applied multiple tests, relying on several aspects such as intention to discriminate (*Lt Col Nitisha v Union of India* 2021) and suspect classification and strict scrutiny (*Anuj Garg v Hotel Association of India* 2008). The common denominator for these tests (if used at all) or any other analysis of discrimination is that the state's justification, if found reasonable by the court, can be allowed to trump a finding of discrimination. Equality scholar Shreya Atrey argues:

> the supervenience of justifications in India is perplexing. But it shows exactly how — despite the technical distinctions between direct and indirect discrimination, and individual grounds in terms of the justifications and standard of review they attract — justification can be all-pervasive … (Atrey 2019: 182).

32. Here, no matter what test I apply, the test for direct discrimination would be met. *Prima facie*, there is intention to discriminate as evident in the text of the statute which explicitly prefers only fathers as the guardians of the child. This is a suspect classification as well, since it is based on the ground of gender, which is a prohibited ground of discrimination under Article 15 of the Indian Constitution. The next step of the analysis would be to ascertain if there is a justification and if it is reasonable in this regard. There has been no justification offered by the Reserve Bank of India, which falls within the ambit of the "state" against whom fundamental rights can be claimed (*M/s Pearson Drums & Barrels Pvt Ltd v The General Manager, Consumer Education & Protection Cell of Reserve Bank of India* 2017), and neither has been one offered by the Union of India in defence of this provision. Thus, given that there exists no reasonable justification for such discrimination, I hold that section 6(a) of the

HMGA 1956 is violative of Article 15 of the Constitution, since it directly discriminates against women on the ground of gender.

33. Additionally, this provision fails to pass the constitutional guarantee under Article 15 since it is grounded in and perpetuates stereotypes about a class constituted by the grounds (ie, sex) prohibited in Article 15(1). Justice Chandrachud observed:

> A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1) (*Navtej Singh Johar v Union of India* 2018: paragraphs 438–439).

34. In India, "guardianship is an extension of paternal power" (Diwan & Diwan 1995). Guardianship dictates a preference of fathers over the mothers to be the primary decision-maker for the children. This can be attributed to age-old Hindu mindset that required men to be dominant within hierarchical family set-ups marked by their propensity to carry on the family names, undertake the last rites for their parents, and be the sole successors of parental properties. Section 6(a) implies that women are economically, intellectually and above all physically incapable as compared to their male counterparts in taking decisions for their children. The provision clearly perpetuates sex-based stereotypes. This was even observed in the 133rd Law Commission Report titled *Removal of Discrimination Against Women in Matters Relating to Guardianship and Custody of Minor Children and Elaboration of the Welfare Principle*, as far back as in 1989:

> The explanation to account for this anomaly is traceable to the traditional belief that a female is an inferior being and a male is a superior being. That such a pro-male bias and an anti-female prejudice should have persisted even after the ushering in of the Constitution of India on 26th Jan., 1950, is somewhat unfortunate because the constitutional command etched in article 15(1) frowns upon such gender-based discrimination. (Law Commission of India 1989: paragraph 1.3)

35. Thus, based on the stereotyping test explicated in *Navtej Singh Johar v Union of India* (2018), I hold that section 6(a) is unconstitutional as it perpetuates discrimination through stereotyping against women on the ground of gender, which is impermissible under Article 15(1) of the Constitution. Further, such a scheme may not even be equipped to handle claims from queer parents or single parents, as it currently operates within the binary. Any such provision therefore, if it references the gender or sexual identity of an individual, would automatically be considered a suspect classification and is likely to violate Article 15(1).

[F] CONCLUSIONS AND DIRECTIONS

36. In light of aforementioned observations, I conclude as follows:

(a) section 6(a) of the HMGA 1956 suffers from the vice of unconstitutionality, as it violates Articles 14 and 15 of the Indian Constitution, 1950;

(b) section 6(a) of the HMGA 1956 is accordingly read down and is to be interpreted as "in the case of a boy or an unmarried girl, the parent";

(c) as is the case even now, when it comes to disputes over custody or guardianship, the Family Court should decide them on a case-by-case basis;

(d) the petitions are accordingly dismissed.

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Towards Intersectional Justice: Judicial Engagement with Queer Women's Asylum Claims in New Zealand

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Abstract

This article analyses the first-level refugee appeal cases in New Zealand by queer women through utilizing an intersectional feminist lens. While New Zealand is often seen as welcoming towards individuals who claim asylum on the grounds of sexual orientation, it has been argued that tribunal judges set high thresholds for establishing the credibility of queer women's asylum applications compared to queer men. An analysis of the decisions of the New Zealand Immigration and Protection Tribunal highlights the judiciary's increasingly progressive understanding of the challenges faced by queer women, contributing to critical analysis challenging intersectional discrimination impacting queer women.

Keywords: gender; sexuality; intersectionality; asylum; New Zealand.

[A] INTRODUCTION

Even though sexual orientation and gender identity (SOGI) are accepted as grounds for persecution in international refugee law, lesbian, gay, bisexual, transgender, and queer (LGBTQ) persons continue to face substantial difficulties in the refugee status determination systems of countries that are often seen as welcoming towards SOGI asylum claims (Ferreira 2022; Sussner 2022; Lasowski & Ors 2023: 605; Millman 2023). A growing body of LGBTQ migration scholarship emphasizes the importance of considering the intersection of gender and sexual orientation in lesbian, bisexual, and queer (LBQ) women's asylum claims and the precarity of queer[1] women in the national refugee status determination systems (Dauvergne & Millbank 2003; Millbank 2003; Neilson 2005; Berg & Millbank 2009; Keenan 2011; Bennett 2013; Arbel & Ors 2014; Dawson &

[1] This article uses the term "queer women" interchangeably with "LBQ women". The author acknowledges that even though the use of the term "queer" aims to be encompassing, not all lesbian or bisexual women espouse that term.

Gerber 2017; Held 2023; Lewis 2023). While sexual orientation is deeply important to the majority of queer women's asylum claims, scholars frequently raise concerns that policy makers, asylum authorities, and the judiciary tend to assess queer women's asylum claims through the lens of gender or sexual orientation, but not both (Millbank 2003; Berg & Millbank 2009: 202; Arbel & Ors 2014; Lewis 2014; Tschalaer 2021; Dustin 2022; Millman 2023: 521). Mengia Tschalaer (2021) further argues that, as race complicates queer women's access to asylum, asylum narratives of women of colour are often complex and should take into account the intersection with race in addition to gender and sexual orientation.

The lack of an intersectional approach (Crenshaw 1989) to the refugee determination process can be argued to result in a failure to identify a wide range of human rights violations connected to sexual orientation. In the context of queer asylum, such violations typically include sexual abuse and assault, forced opposite-sex marriage, marital rape, domestic violence, "corrective rape" by police officers or members of the community, harassment, discrimination in housing and employment, destruction of property, blackmail, and so-called conversion therapy (Lasowski & Ors 2023: 606 & 610). The use of intersectionality as an analytical lens acknowledges the multi-faceted ways in which LBQ women attempt to protect themselves in their everyday lives and avoid violating established social and religious boundaries (Tschalaer 2021).

New Zealand, along with other states globally, has seen increasing numbers of asylum claims by LGBTQ persons in recent years (Kiel 2022). Despite this, Mariza Avgeri (2025: 194) notes that asylum claims based on sexual orientation or gender-based harm have often faced obstacles both in refugee and human rights adjudication until relatively recently. Consequently, existing scholarship on asylum-seeking LBQ women frequently highlights the shortcomings of national asylum decision-making and appeals processes. There are some recent exceptions to the narrative that gender-related elements of asylum cases are scarce, however. In the past few years, for instance, the Court of Justice of the European Union (CJEU) has adopted a progressive gender-sensitive approach towards refugee protection (Nicolosi & Lagrand 2026: 158). Despite this, the CJEU's jurisprudence on sexual orientation discrimination in the context of women's asylum claims remains largely undeveloped.

The significance of the article lies in the potential it creates for a more inclusive understanding of the protection needs of LBQ women based on asylum jurisprudence emerging from New Zealand. While the focus of the New Zealand Immigration and Protection Tribunal (hereinafter the

Tribunal) is on discrimination on grounds of gender and sexual orientation, it explicitly recognizes that gender and sexuality should be considered in relation to other factors, including age, ethnicity, and religion, which interact to place LBQ women at risk of gender-based violence in multiple ways. Therefore, the decisions of the Tribunal have wider significance for the development of a more inclusive understanding of women's protection needs in other jurisdictions and the development of international refugee law in general.

This article focuses on nine first-level refugee appeal cases before the Tribunal between 2017 and 2025. The author searched the decisions directly through the website of the New Zealand Ministry of Justice (nd). The decisions chosen for analysis demonstrate how the national asylum regime establishes ontological borders that distinguish between successful and unsuccessful asylum applicants along the lines of gender, sexuality, race or ethnicity, and religion. By doing so, this article highlights the Tribunal judges' increasing understanding of the challenges faced by queer women in the national asylum process, while also underlining room for improvement. Whereas previous research has maintained that asylum adjudicators and authorities fail to understand that women and men experience heteronormative persecution on the grounds of sexual orientation very differently, resulting in a higher burden of proof for queer women to demonstrate the credibility of claims (Arbel & Ors 2014: 5; Dawson & Gerber 2017), this article argues that the Tribunal recognizes these differences by emphasizing the intersectionality of gender, sexuality, and gender-based violence in many of its decisions.

This article is structured in the following way. Section [B] sets the research context by examining challenges faced by queer women in national asylum processes, including stereotypical notions of gender and sexual orientation, the invisibility of LBQ women in asylum jurisprudence globally, and the nature of private harms experienced by queer women. Section [C] provides an analysis of nine decisions of the Tribunal in order to assess how its judges increasingly make decisions that recognize the intersectional nature of the appellants' asylum claims, the consistency of their narratives based on the available information about the country of origin, supporting testimonies, and, in some cases, academic literature supporting their claims. Section [D] addresses concluding considerations and proposes ways for improving the assessment of queer women's asylum claims by lower-level decision-makers.

[B] CHALLENGES FACED BY LBQ WOMEN IN THE ASYLUM PROCESS

Stereotypical notions of gender and sexual orientation

One of the prevalent issues in queer asylum scholarship is the highly stereotyped and Western idealizations around gender and sexuality that judges have relied on to reject queer asylum claims in countries that seemingly offer the potential for more freedoms for asylum seekers (Millbank 2009; Millman 2023: 505 and 527). Eithne Luibhéid (2019) criticizes the expectations in national asylum policy instructions and guidance that LBQ women must conform to the outward, neoliberal expressions of sexual identity, which assume a stable, coherent, and fully realized identity at the time of their asylum application. Moira Dustin (2018: 110) argues that such assumptions effectively penalize asylum seekers whose lived experiences or cultural backgrounds do not conform to these expectations. Further, the reason why LBQ women often hide their sexual orientation in their country of origin is related to their need to protect themselves from harm motivated by their gender or sexual orientation, especially where the general climate of the country is homo- or transphobic (Tschalaer 2021: 3542).

The so-called "discretion reasoning" is another topic that commonly emerges in the scholarly debates concerning SOGI asylum claims, especially in the context of the examination of whether an asylum applicant faces the risk of persecution at home if they tell no one they are queer, that is, they are "discreet" about their sexual identity (Lewis 2014; Kiel 2022). While the Tribunal does not apply discretion reasoning to its decisions, many countries have, at least in the past, required queer applicants and appellants to demonstrate that their decision not to disclose their sexual orientation to others in the country of origin was due to a fear of persecution rather than a decision to be discreet (Dawson & Gerber 2017: 295). The Tribunal has regularly held in its decisions that "no one is required to … modify their behaviour to avoid persecution" (*EU (Tonga)* 2025: paragraph 43) and that a lesbian appellant has the "right to freely express her identity, including her sexuality, which is protected by Articles 2 (non-discrimination) and 17 (right to freedom from arbitrary or unlawful interference with her privacy, family and home)" of the International Covenant on Civil and Political Rights (*CN (Philippines)* 2022: paragraph 93).

An increasing number of scholars indicate that interviews with queer women reveal that women frequently face stereotypical assumptions of

how they should behave during their asylum process (see eg Lewis 2014; Danisi & Ors 2021; Tschalaer 2021; Danisi & Ferreira 2022; Kiel 2022). Although, asking sexually explicit questions or making stereotypical assumptions about how LBQ women should behave based on their sexual orientation is not only a violation of their human dignity and right to privacy, but also ineffective in proving one's queerness (Kiel 2022: 81). Yet, asylum authorities continue to ask LGBTQ asylum seekers such questions (Dawson & Gerber 2017: 299; Danisi & Ors 2021: 297). Asylum authorities in several European states, including the United Kingdom (UK) and Germany, are argued to commonly rely on stereotypes that LBQ women are not thought to be queer based on their physical appearance, a history of an opposite-sex marriage which has produced children, or that all queer women will immediately come out upon their arrival in the country of asylum (Bennett 2013; Lewis 2014: 965; Tschalaer 2021: 354; Danisi & Ferreira 2022: 8). Carmelo Danisi and Nuno Ferreira (2022: 3) argue that queer women's experiences of early or forced marriages and motherhood in cases where they do not have a choice whether they will be married and have children are recurrently used to undermine their asylum claims on the grounds of sexual orientation. The fact that a woman has not consented to the marriage may not make any difference because being married with children is seen as a deviation from the normative queer lifestyle. Therefore, queer women are seen to satisfy heteronormative societal expectations of marrying and having children (Danisi & Ferreira 2022). Yet, a woman's departure from her country of origin signals her refusal and lack of consent to forced marriage (Honkala 2022: 490).

The United Nations High Commissioner for Refugees (UNHCR 2015) acknowledges that LBQ women face challenges in the process of seeking asylum because SOGI-specific information about countries of origin that would be helpful in the context of their claim is not always available. The lack of information about countries of origin relating to LBQ women is connected to the invisibility of queer women asylum jurisprudence globally. This is because the failure to properly consider the intersection of gender and sexuality often stems from inadequate information about queer women in the country-of-origin information reports (Dawson & Gerber 2017). Rachel Lewis (2014: 964) argues that in the context of LBQ women's asylum cases, courts are quick to conclude that they do not face persecution in the country of origin if there is no documented evidence of human rights abuses against LBQ women in the country-of-origin information reports. Asylum claims by LBQ women pose particular challenges to adjudicators especially when the country-of-

origin information is silent on queer women's experiences of persecution (Danisi & Ors 2021: 234). Additionally, there is also evidence that courts and tribunals have made decisions on LBQ women's asylum cases by referring to country conditions based on experiences of gay men. According to Jake Millman (2023: 506-507), this is in part because the nature of discrimination and persecution experienced by queer women is often private and in part because there is very little scholarship on their experiences that may be beneficial to their claims.

Invisibility of LBQ women in asylum case law across jurisdictions

The issue of visibility of sexual orientation arises frequently in existing scholarship concerning LBQ asylum-seeking women. There are several explanations for this. First, existing research suggests that the global LGBTQ asylum system is highly gendered due to the assumption that men are persecuted for their political activities, whereas women most frequently claim asylum as family members of successful refugees. There is a widespread agreement among scholars that the definition of the term "refugee" in Article 1A(2) of the 1951 Convention relating to the Status of Refugees (the Refugee Convention) was initially set out to protect Western, white, middle-class men from harm by the military or the police after openly criticizing the state and its institutions (Neilson 2005: 419; Rehaag 2009; Luibhéid 2019; Tschalaer 2021: 3534). Second, scholars suggest that queer women suffer invisibility in asylum scholarship and practice because fewer asylum applicants are women (Millman 2023: 507). This idea is supported by others who argue that queer women are less likely to leave their countries when facing persecution, given the limits placed on women by patriarchal forces (Macklin 1995: 221; Millbank 2003; Schiele 2024: 3).

Third, the invisibility of queer women is further exacerbated by the fact that lower-level decision-makers may be unfamiliar with the type of harms that LBQ women may face. The UNHCR (2015) acknowledges that asylum authorities do not always have adequate understandings of diverse SOGI experiences in different cultural contexts. These factors may seriously affect the assessment of the protection needs of queer women, by negatively impacting the examination and assessment of the credibility of individual asylum claims (UNHCR 2011). The invisibility of queer women in asylum case law across jurisdictions is compounded by the fact that, while courts and tribunals recognize that both a queer woman and a queer man can be considered to be a member of a "particular social group" under Article 1A(2) of the Refugee Convention, the situations of queer

men often fit better within the established precedents concerning asylum because they are more likely to suffer public forms of harm (Neilson 2005: 420; Dawson & Gerber 2017: 316). Due to asylum officials' continued assumption that LBQ women are less likely to face persecution in their countries of origin because there are fewer incidences of women being attacked or harmed in public than LBQ men, scholars suggest that queer women are most likely to succeed in sexual orientation-based claims in cases where they can demonstrate that they have experienced harm in the public sphere in their country of origin (Keenan 2011; Lewis & Naples 2014: 915).

Scholars argue that LBQ women do not typically experience harms that predominantly affect queer men, including arrest, detention, or torture due to the criminalization of consensual same-sex conduct, although LBQ women claiming asylum may experience sexual assault at the hands of state officials such as the police or prison guards (Dawson & Gerber 2017; García Rodríguez 2023). While LGBTQ persons can reasonably fear persecution due to criminalization of same-sex consensual conduct, considering that some countries impose corporal punishment or death, in practice such laws are often drafted in such a way that they apply exclusively or mainly to men (Dustin 2018; Kiel 2022). Laws impacting on queer women are nevertheless common because countries may enact a whole host of other laws and policies to persecute, prosecute, and stigmatize LBQ women (Lasowski & Ors 2023: 606). When the tribunal judges find that a queer woman does not have a reason to fear persecution because the legislation in the country of origin prohibits consensual same-sex conduct between men but does not include female same-sex relationships, the judiciary fails to see the ways in which LBQ women are persecuted by non-state actors in the country of origin. In the decisions of the Tribunal, the lack of state protection against so-called private harms is often central to finding that the appellant needs international protection.

The nature of private harms experienced by queer women

In addition to the types of violence that also affect queer men, including mob violence and honour killings, queer women overwhelmingly experience private forms of harm committed by men who are members of their immediate or extended family or wider community (Millbank 2003: 75; Dawson & Gerber 2017: 317). Additionally, violence against women is far more likely to occur in the home or workplace and is more likely to consist of "sexualised forms of assault", including rape and forced

marriage (Millbank 2003: 75). As gender-based violence is frequently seen as outside the view of the law or law enforcement in the countries of origin, asylum claims based on gender-based violence, including forced marriage, rape, forced pregnancies, and intimate partner violence, often also impacting queer women, have frequently gone unrecognized within national asylum systems (Lewis 2014: 964; Arbel & Ors 2014; Dawson & Gerber 2017: 317; Dustin 2022). Scholars increasingly recognize that queer women experience coerced marriage, intrafamilial physical aggression, sexual violence within marital contexts, sexual harm within familial circles, and enforced pregnancies and abortions (Tschalaer 2021: 3534; Dustin 2022). Positively, the Tribunal recognizes that, in cases where the country of origin fails to enact legislation protecting queer women from forced marriage and marital rape *(EH (Bangladesh)* 2024) or due to negligent attitudes of the police (*CN (Philippines)* 2022), these types of instances are examples of intersectional persecution on grounds of gender and sexual orientation. For instance, even though the Philippines had adopted legislation prohibiting violence against women, the Tribunal noted that, because the societal discrimination against LBQ women permeated the police, they could not rely on police officers not to be complicit in the harm they experienced (*CN (Philippines)* 2022: paragraph 103).

The private nature of persecution and violence queer women endure presents challenges for their asylum applications (Millman 2023). While it is of benefit to LBQ women that courts and tribunals recognize non-state persecution and family-based violence, the private forms of violence and persecution perpetrated by non-state actors make it difficult for queer women to provide corroborating evidence because the private nature of persecution is less likely to lead to tangible pieces of evidence such as police records (Millbank 2002; 2003). Tschalaer (2021) criticizes the centrality of tangible evidence such as public reports, letters of support from non-governmental organizations and faith groups, as well as social media to corroborate a claim of persecution. This links to the argument by Victoria Neilson (2005), Sarah Keenan (2011), and Rachel Lewis and Nancy Naples (2014) that queer women are likely to succeed in their claims if they can demonstrate that their experiences of persecution have occurred in the public sphere.

The UNHCR (2011) has acknowledged that the risk of not recognizing the intersectional nature of persecution on grounds of gender and sexual orientation is further exacerbated by the difficulty queer women face in discussing their SOGI experiences, especially if they have been subjected to sexual and gender-based violence. Tschalaer (2021: 3540-

3541) argues that the lack of information about persecution facing queer women and their unwillingness to talk about their experiences enables asylum assessors to trivialize the experiences of queer women of colour. To illustrate the range of issues discussed in this section, the next section analyses nine appeal cases before the Tribunal in recent years.

[C] APPEALS CASES BEFORE THE TRIBUNAL

Insufficient evidence of serious harm or same-sex relationships

While the Tribunal acknowledges the intersectional nature of persecution in many of its decisions concerning asylum-seeking LBQ women, over the years it has rejected several appeals because it either has not seen an imminent threat of persecution or it has doubted the queer women's account of their sexual orientation in the absence of evidence attesting the nature of their relationship in the form of chat and text messages, corroborating testimonies, or letters of support. The issue in these cases is that the appellant must convince the Tribunal of the existence of serious harm. The type of events that the Tribunal considers to constitute serious harm differs.

In an appeal by a white, South African lesbian couple in *BX (South Africa)* (2017), the Tribunal ordered the couple's deportation because it was not convinced that the couple, who had been together for over three decades, feared serious harm upon return to South Africa. The Tribunal raised several concerns in its decision. Essentially, it did not think that the couple had an objective, well-founded fear of being persecuted because they had remained in New Zealand over eight years before claiming asylum. While the Tribunal accepted that black lesbians may face vulnerability to incidents of gender-based violence, including corrective rape in South Africa, it did not accept that the couple had established an objective well-founded fear of being persecuted upon their return on the grounds of their sexual orientation and socio-economic background. It considered that the low-level harassment, verbal abuse and violent incidents that BX had been subjected to nearly 25 years previously were not sufficiently serious as they were limited in number and historical in nature (paragraph 65). Consequently, the Tribunal concluded that the evidence was insufficient to establish a real chance of serious harm to BX in the context of objective country-of-origin information reports as no records existed of her reporting the incidents to a doctor, a hospital or the police (paragraphs 65-66).

Ndumiso Ngidi & Ors (2026: 705) argue that even though South Africa has legalized same-sex marriage and the country's Constitution explicitly prohibits discrimination based on sexual orientation, LGBTQ persons experience high levels of verbal harassment, threats of violence, sexual violence and coercive policing of their sexuality. While experiences of verbal harassment and threats of violence are often seen as less harmful in comparison to physical violence, they have severe psychological and social consequences, including chronic anxiety, depression, and isolation (Ngidi & Ors 2026: 705). When the authorities deem experiences of violence either as unrelated to the LGBT asylum claim, or an asylum claim simply as not credible, they erase queer women's experiences of persecution in their decisions (Tschalaer 2021).

In *AO (Indonesia)* (2022), the Tribunal considered an appeal by a lesbian woman in her mid-twenties who claimed to fear serious harm in Bali, with hostility and intolerant attitudes towards the LGBTQ community rising in Indonesia since 2020. The Tribunal was concerned about the credibility of her evidence, specifically the existence of her lesbian relationship in Bali (paragraph 61). The absence of a same-sex relationship makes the decision-makers doubt the genuineness of LBQ women's asylum narratives (Tschalaer 2021: 3541). In *AO (Indonesia)* (2022: paragraph 62), the Tribunal noted that AO was unable to provide any substantive evidence of the nature of the couple's relationship beyond various photographs. It also viewed negatively the unwillingness of AO's former girlfriend to appear before the Tribunal even though she was in New Zealand (paragraph 62). It further doubted the genuineness of AO's asylum claim because it coincided with large numbers of asylum claims submitted by Indonesian and Malaysian nationals, who had made similar claims in their application forms, several of whom lived at the same residential address in New Zealand, and who were represented by the same lawyer (paragraph 54).

While the Tribunal observed that little information existed about LBQ women in Bali, possibly because of the community's low profile and lack of visibility, there was no evidence that LBQ women faced arrests or violent incidents (*AO (Indonesia)* 2022: paragraph 96). Although the existing country-of-origin information suggested that high-profile individuals who were open about their sexuality could face hostility in social media, the Tribunal did not consider that AO was likely to face systematic discrimination or serious harm because of her sexuality upon return (paragraphs 96-98 & 100). Yet, Susanti (2024: 515) notes that the Indonesian People's Consultative Assembly and the Indonesian House of Representatives openly oppose LGBTI rights.

The Tribunal's decision in this case can, however, be criticized on the grounds that, when the judiciary denies that an LBQ woman experiences persecution, it reflects the general invisibility of queer women's situation (Keenan 2011; Millbank 2003) in Bali due to the absence of relevant country-of-origin information relating to sexual orientation. Even though Indonesia has never criminalized same-sex consensual conduct (Colangelo 2024), it does not mean that LBQ women do not face persecution there just because they live largely invisible lives (Sussner 2022: 48).

While the Tribunal acknowledged that it was notoriously difficult for the appellants to establish their sexual identity in a tribunal setting, in *ST (India)* (2024: paragraphs 42 & 46) it nevertheless concluded that it had concerns in relation to other aspects of the account of an Indian woman in her mid-forties. While ST produced photographs showing her with another woman as evidence, nothing in the photographs established the nature of their relationship (paragraph 65). Consequently, she lacked a well-founded fear of being persecuted in India because of her sexual orientation (paragraphs 44 & 81).

Both *AO (Indonesia)* (2022) and *ST (India)* (2024) reveal how the absence of sufficient evidence of same-sex relationships results in the Tribunal doubting the genuineness of the appellant's experiences. The two decisions also highlight the need for queer asylum applicants to produce evidence of intimate conversations over dating apps or social media, which may convince the decision-makers of the existence of a same-sex relationship in the country of origin (Danisi & Ferreira 2022: 13). At the same time, however, it must also be noted that it is often difficult for queer women from conservative societies to prove their asylum claims as they may have never had a romantic relationship with another woman for the fear of the consequences of engaging in same-sex relationships (Neilson 2005: 347; Dawson & Gerber 2017: 314). For instance, both Tschalaer (2021: 3541) and Dustin (2022: 407) note that LBQ women from sub-Saharan countries like Uganda and Zimbabwe may be fearful of disclosing their sexual orientation due to the risk of violence or imprisonment. The lack of protection by the police further exacerbates the fear of being outed, making the claimants very cautious to come out in a country of asylum. Therefore, the expectation that queer women can provide evidence of same-sex relationships ignores the impossibility of being an openly queer woman in a conservative society (Tschalaer 2021).

Danisi & Ferreira (2022: 12) note that authorities' approach towards asylum claims on the grounds of sexual orientation is contradictory. While the authorities want to see evidence of an intimate bond between a

couple, they refuse to accept the existence of a relationship when they are shown pictures featuring the couple together. In order to establish the importance of a relationship for the purposes of asylum, authorities often assess intimate relationships through a heteronormative perspective, emphasizing long-term monogamous same-sex relationships without questioning the fact whether these are even attainable in most conservative societies (Danisi & Ferreira 2022: 13; García Rodríguez 2023: 526). Dustin (2018) proposes that, instead of asking appellants to prove that they are queer, the decision-makers should be asking questions such as whether the applicant is from a country where LGBTQ persons are persecuted and whether they would be viewed as LGBTQ upon return. The next subsection focuses on appeal decisions where the appellants have claimed asylum in New Zealand on grounds of gender-based violence and sexual orientation.

Gender-based violence and discrimination against queer women

Many of the appeal cases concern claims focusing on gender-based violence such as forced marriage and sexual and marital violence against LBQ women in the countries of origin. In addition to sexual orientation, other personal characteristics such as religion, ethnicity and age play a role in many of the decisions concerning LBQ women, albeit in a subtle way. The Tribunal frequently mentions that the women are of a certain nationality and ethnicity and that they come from socially conservative countries and families (*AW (Malaysia)* 2018; *CN (Philippines)* 2022; *EH (Bangladesh)* 2024). The women's ages are also mentioned in most decisions. It appears women who have been successful on appeal before the Tribunal in recent years are usually unmarried lesbian or bisexual women in their twenties and thirties.

The analysis demonstrates that the Tribunal often deals with gender and sexual orientation together, recognizing that queer women's fear or experience of harms such as forced marriage and sexual or marital violence are related to the appellant's sexual orientation. For instance, in *EH (Bangladesh)* (2024: paragraph 64), the Tribunal explicitly notes that the young Muslim lesbian appellant's predicament arose from "the intersectionality between her sexual orientation and her gender", which are both covered by the ground of the membership of a particular social group. This is important because many LBQ women are persecuted on the basis of their sexuality and are also exposed to gender-based violence. Therefore, they should be covered by the country guidance relating to both forms of persecution in particular countries (Dustin 2022: 402).

Consequently, the Tribunal's approach differs significantly from the approach often adopted in the UK asylum system, where official guidance and case law assumes that women asylum claimants are fleeing either gender-based violence or discrimination on grounds of sexual orientation, but not both (Dustin 2022: 394).

Olivia Kiel (2022: 64) suggests that one of the decisive factors in the Tribunal's reasoning is the credibility of the narrative. In other words, whether the appellant is able to present a claim which is coherent, plausible and does not contain contradictory claims. Kiel (2022) criticizes the centrality of the credibility assessment in the Tribunal's decisions by stating that it can essentially influence the success of the appellant on appeal. However, more recent decisions demonstrate that, in addition to scrutinizing the narrative of the appellant alongside the corroborating testimonies, a large part of the Tribunal's assessment focuses on the country-of-origin information and prospective harm upon return. This differs from the argument made by several scholars according to whom courts and tribunals in many other jurisdictions focus on the credibility assessment and the question of whether the appellant is really queer (Tschalaer 2021; Dustin 2022).

EH (Bangladesh) (2024) is an illustrative example of a decision where the Tribunal gives the benefit of the doubt to the narrative of a lesbian appellant in her twenties, who was still exploring her sexuality at the time of her initial asylum application. The Tribunal was satisfied that EH would face serious consequences for exploring and expressing her sexual orientation in Bangladesh, where same-sex activity is criminalized. However, it is also worth noting that in other instances the Tribunal has been a little more dubious about appellants who claim to have identified as LBQ later in life, in their mid-forties or early sixties (*FY (Sri Lanka)* 2020; *ST (India)* 2024). Even though Sri Lanka also criminalizes same-sex activities, it is plausible that the age of the appellant and her history of relationships with both men and women meant that the Tribunal did not consider her at risk of persecution on the grounds of sexual orientation.

Many of the decisions analysed for the purposes of this article concern forced marriage and lack of state protection against gender-based violence, committed either by members of their families or the wider community. As in many societies LBQ women face expectations to marry, the absence of marriage may raise questions about their sexual orientation. Tschalaer (2021) notes that many LBQ women from societies that criminalize same-sex activities may feel the pressure to marry so as not to attract unwanted attention to themselves from members of the community who perceived

them as LBQ. Four cases (*AW (Malaysia)* 2018; *CN (Philippines)* 2022; *EH (Bangladesh)* 2024; *JF (Sri Lanka)* 2024) concern the pressure from the women's family to marry. In *JF (Sri Lanka)* (2024: paragraph 200), the bisexual appellant in her early thirties had been forced to marry against her will before arriving in New Zealand. The Tribunal noted that, as she was diagnosed with autism spectrum disorder in New Zealand, she would be more vulnerable than others to abuse and exploitation and subject to further unwanted and non-consensual sexual assaults if she was to return to Sri Lanka and remarry against her will (paragraph 108).

The other three decisions raised the issue of lack of state protection against forced marriage, marital rape, and conversion therapy, which have all been recognized as human rights violations connected to sexual orientation (Lasowski & Ors 2023). In *AW (Malaysia)* (2018: paragraphs 73-74), the Tribunal recognized that the appellant, a single Muslim woman in her early thirties, could not expect any support or protection against forced marriage from the state (paragraph 74). It further noted that the appellant's "continued unmarried state would only raise the 'suspicion' that she was lesbian" (paragraph 73). Additionally, her parents were hostile towards LGBTQ persons and the prevailing societal and state view in Malaysia was that LGBTQ persons needed to be "cured" (paragraph 73). Therefore, far from offering protection against persecution facing LBQ women in Malaysia, the state contributed to the existence of the risk (paragraph 74).

The lack of state protection was decisive also in *CN (Philippines)* (2022). The Tribunal noted that the lesbian appellant in this case lacked access to state protection due to widespread discrimination against LBQ women in the Philippines. It was satisfied that there was a real chance that her religiously conservative, Catholic family would try to force her to undergo conversion therapy if they found out that she was queer (paragraph 100). Similarly, in *EH (Bangladesh)* (2024: paragraph 54) the Tribunal accepted that should a young lesbian Muslim woman return to Bangladesh, her consent to the forced marriage was unlikely to be genuine and, if she refused, she would be ostracized (paragraph 59). It was further evident that the state failed to protect women and underage girls from marital rape (paragraph 50).

In all these cases, the Tribunal concluded that forced marriage is a gender-related form of persecution, as recognized in several national and international refugee law documents as well as in legal scholarship (see eg *EH (Bangladesh)* 2024: paragraphs 57 & 61 citing Dauvergne & Millbank 2010). In finding that each of the appellants is a refugee within the meaning of the Refugee Convention, the Tribunal seemingly

recognizes that the protection need is based on sexual orientation, being a woman and refusing a forced marriage (Dustin 2022).

[D] CONCLUSION

Many of the recent appeal decisions of the Tribunal highlight the fact that women's experiences as LBQ, of certain age, ethnicity and religion contribute to the specificity of their treatment and experiences and may be relevant to an asylum claim. The successful appellants often came from socially and religiously conservative societies or families and often faced rejection by their family members if their families discovered that they were LBQ and/or if they refused to conform to societal expectations, which often included marrying men their families had chosen (eg *AW (Malaysia)* 2018; *EH (Bangladesh)* 2024; *EU (Tonga)* 2025). The appellants also often experienced gender-based violence and sexual violence at the hands of members of their extended families (*AW (Malaysia)* 2018), members of the community, or complete strangers (*HV (Sri Lanka)* 2023; *CN (Philippines)* 2022). In some instances, the women's parents had indicated they would attempt to cure or convert their daughters by taking them to spiritual healers or forcing them to undergo conversion therapy (*AW (Malaysia)* 2018: paragraphs 72-73; *CN (Philippines)* 2022).

While Arbel and colleagues (2014) argue that there is some evidence that queer women are sometimes more successful on appeal than queer men, Millman (2023: 520) found this not to be the case in New Zealand, where queer men have had a significantly higher success rate on appeal compared to queer women. According to Millman (2023: 501), one reason for this is that Tribunal judges in New Zealand set a higher threshold for queer women to establish that they are credibly LBQ. While this article did not evaluate queer women's success rates on appeal, many of the successful appeal decisions discussed in section [C] suggest that the Tribunal accepts that queer women are unable to rely on the state for the protection of their rights in their home countries. Indeed, the absence of state protection against gender-based violence and discrimination is central in virtually all of the successful appeals considered in this article.

What these cases also suggest is that lower-level decision-makers fail to properly consider the gendered elements of LBQ women's asylum claims (Danisi & Ors 2021; Dawson & Gerber 2017). As many recent decisions of the Tribunal highlight the prevalence of violence and discrimination against queer women, especially in countries in South-East Asia which criminalize same-sex consensual relationships but do not criminalize sexual and gendered-based violence, it could be argued

that it is likely that the lower-level decision-makers and practitioners are unable to recognize the ways in which sexual orientation exacerbates gender-based violence in cases where such violence is state-condoned and supported. It would therefore be essential that national refugee and protection officers undergo mandatory and regular training on sexual orientation-related country-of-origin information as this would equip the officers with appropriate knowledge and skills to deal with LBQ women's asylum claims without preconceptions based on nationality or ethnicity of LGBTQ claimants from particular countries of origin (Danisi & Ors 2021: 220; Tschalaer 2021; Ferreira 2022: 324).

Overall, the Tribunal's recent decisions concerning asylum appeals by LBQ women are significant and important as they adopt an intersectional approach to identify various human rights violations connected to sexual orientation. The Tribunal generally adopts a view that recognizes that LBQ women have a right to enjoy a range of basic rights, including freedom from discrimination in everyday life, encompassing the ability to access employment or housing; the right to enjoy their lives free from violence, intimidation, fear and psychological harm; freedom to explore their sexual orientation, and freedom to form intimate relationships and love a person of their choosing. The Tribunal's nuanced understanding of the forms of persecution that LBQ women experience in societies where homophobia, intolerance and discrimination against LGBTQ persons are widespread, demonstrates that the Tribunal judges accept that no one deserves to live their lives under a constant threat of being subjected to treatment that undermines their right to dignity, equality, and personal autonomy in society. The inclusive and rights-based approach adopted by the Tribunal judges serves as inspiration for courts and tribunals in other jurisdictions when addressing similar asylum claims in the future.

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Queering the Form of the Judgment: On Misgendering, Deadnaming and Cisnormative Fact Construction in the Decisions of the European Court of Human Rights

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Abstract

In *TH v Czech Republic* (2025), the European Court of Human Rights (ECtHR) found in favour of a non-binary applicant for the first time. However, throughout its judgment, the ECtHR also misgendered the applicant by using masculine pronouns. In this article, we explore the effects of such seemingly small aspects of the judgment's form through a queer lens. Focusing on ECtHR decisions concerning trans* and gender diverse people, we argue that misgendering, deadnaming and the use of pathologizing language produce a cisnormative "background", which can have a "disorienting" effect on queer readers and a "straightening" effect on society more broadly.

Keywords: European Court of Human Rights; judgment; form; trans*; gender diverse; misgendering; deadnaming; pathologization; cisnormativity.

[A] INTRODUCTION

In June 2025, the European Court of Human Rights (ECtHR) issued a judgment in *TH v Czech Republic* (2025)—the first (known) case before it involving a non-binary applicant. The case concerned the Czech authorities' refusal to grant the applicant's request to change their personal numerical

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code denoting gender from a male one to either a "neutral one or, at the very least, a female one" (*TH v Czech Republic* 2025: paragraph 7). The authorities had refused this request on the basis that the applicant had not fulfilled the requirement of "sex reassignment surgery", which was a statutory condition for making such a change at the time. The ECtHR ultimately found in the applicant's favour, reaffirming its position, as established in previous cases, that "making the legal recognition of the … gender identity of transgender people conditional on sterilisation, or on treatment involving a very high probability of sterilisation which such individuals do not wish to undergo" (*TH v Czech Republic* 2025: paragraph 49) violates the right to private life under Article 8 of the European Convention on Human Rights (ECHR).

And yet, despite this apparently positive outcome,[1] the ECtHR also misgendered the applicant throughout its judgment by using masculine pronouns to refer to a person whom it acknowledged as identifying "with having a non-binary gender identity" (*TH v Czech Republic* 2025: paragraph 6). This constituted a departure from both the ECtHR's previous communications in the case (*TH v Czech Republic* 2023), as well as the Czech Government's submissions (Ministerstvo Spravedlnosti 2024), which both addressed the applicant using feminine pronouns, coming closer to respecting the applicant's identity, while still not fully respecting their wishes (Ouředníčková & Vikarská 2025). The ECtHR justified its use of masculine pronouns on the grounds that, "[o]n the date of lodging of the application, the applicant was regarded for civil-law purposes as belonging to the male sex" (*TH v Czech Republic* 2025: paragraph 4)—an odd decision, given the Court's finding that the same legal status was the result of a legislative framework that had placed the applicant in an "insoluble dilemma" (*TH v Czech Republic* 2025: paragraph 58) and was thus incompatible with the ECHR. The ECtHR clarified that its use of the masculine form "cannot be construed as excluding [the applicant] from the gender with which [the applicant] identifies" (*TH v Czech Republic* 2025: paragraph 4). But this raises questions about the kinds of constructive effects judgments have. While it may be within a court's power to designate whether something is to have a legal effect, it is not so simple when it comes to the social and political effects that flow from a judgment's use of language or narrative choices.

This article explores the effects of these seemingly minor aspects of the judgment's form, drawing on insights from queer theory. We base our analysis on a selection of ECtHR cases concerning transness or gender diversity. The cases we discuss do not constitute an exhaustive

[1] The substantive decision also had limitations (Chollet 2025; Ouředníčková & Vikarská 2025).

representation of the field. Rather, we have selected a mix of earlier cases dating back to 1980, a number of cases from the more recent past (the 2000s and 2010s), and a selection of contemporary examples from the 2020s in order to illustrate the ECtHR's shifting approach to language and narrative over time.

We argue that misgendering and deadnaming practices, the use of pathologizing language, and the inclusion of intimate medical details in the summary of the facts function to produce a cisnormative "background", which accommodates certain bodies and ways of being but not others. This can have a "disorienting" effect on the queer reader, making them feel uncomfortable and out of place, regardless of the substantive outcome of the case.

This article begins with an account of why the form of a judgment matters, outing how a judgment's use of language and narrative can encode certain messages, ideas or worldviews (section [B]). As part of this, we engage with Sara Ahmed's work on queer phenomenology to draw out how the background details of a judgment can have both "disorienting" effects on queer subjects and "straightening" effects on society more broadly. We then provide a queer critique of the form of the ECtHR's judgments in cases involving trans*[2] and gender diverse people, comparing historical trends with contemporary ones (section [C]). In the final section, we consider how the form of the judgment could be approached differently through examples drawn from recent queer and feminist judgment projects (section [D]).

[B] WHY FORM MATTERS

Most legal scholarship focuses on a judgment's substance—that is, *what* it says in terms of the law. Yet, as many of the recent feminist, queer and other alternative judgment-rewriting projects have made clear, *how* a judgment conveys its findings, through layout, language, style, tone, the arrangement of information and other narrative choices, is often crucial to the way it is received (see, eg, Rackley 2010). To begin, the very fact that something *looks* like a judgment, through details such as a header, seal and even font, is part of what transforms it from a document containing an individual or collective opinion into a *legal* determination (Charlesworth 2023: 612). In other words, form helps to imbue a judgment with the authority of law.

[2] In this article, we use the term "trans*" as an umbrella term for the wide range of individuals whose gender and/or expression differs from the sex assigned to them at birth, including non-binary people.

Through its judgment, a court is also attempting to *persuade* its audience—first and foremost, that its decision is the "correct" one, but often, whether consciously or not, of the judges' underlying assumptions and worldviews too (see, eg, Johnson 2014: 553). While much of a judgment's persuasive force comes from its substantive reasoning, persuasion is also inevitably bound up with stylistic and rhetorical choices (Klinck 1986: 656). This is perhaps most obvious when it comes to the storytelling involved in the rehearsal of the facts. The judgment presents the opportunity to provide the "official" account of the event in question, the context of the dispute, and any "relevant" information about the parties involved (Rackley 2010: 45). How a court chooses to arrange and narrate these details, as well as what it decides to leave out, shapes our understanding of the "problem" that gave rise to the judicial process in the first place and thus the extent to which we accept the "solution" provided (Rackley 2010: 46). For example, Tanzil Chowdhury has argued that the adjudicative temporalities used in judicial fact construction can produce very different legal subjectivities. Beginning a legal event at the point at which a woman poured petrol on her husband can produce "a fully agential subject of law, making a victim of sustained domestic violence a murderer" (Chowdhury 2020: 2). In contrast, starting the story earlier, and thus bringing in that history of violence, may complicate "the picture of a fully willed legal actor" (Chowdhury 2020: 2).

But the persuasive force of a judgment's form does not end with its construction of the facts. Vocabulary, grammar, the length and complexity of sentences, and the level of formality throughout the judgment can all also play a role in "encoding" the court's message, idea or outlook (Posner 1995: 1422). For instance, it has been observed that the use of "short, staccato paragraphs can, whether intentionally or not give a judgment an added appearance of decisiveness" (Rodger, quoted in Rackley 2010: 46). A judgment's use of active or passive language can also affect how its subject matter is presented. In a study of ECtHR cases concerning religion and culture, for example, Lourdes Peroni points out how the Court's use of passive phrases such as "the wearing of the headscarf" works to erase the subject and transform her action into the "thing" under analysis, reducing the sense of agency surrounding the practice of veiling (Peroni 2014: 217).

While these persuasive techniques often echo the judgment's substance (Rackley 2010: 46), they can sometimes complicate or undercut it, particularly where the discrete outcome of the case risks not fitting neatly within established legal parameters or dominant social norms. In such cases, we might find two opposing currents of persuasion: one in

the legal reasoning and one embedded in the judgment's form. Or, put another way, there may be one message in the "foreground" and another in the "background". This may not make a difference legally, as the legal reasoning is what matters in terms of law. But it can make a difference socially and politically. For example, Sarah Ganty argues that the use of stigmatizing narratives or language in judgments relating to poverty can reinforce myths about people in poverty being "[l]azy, criminal, negligent parents, not politically able, unreasonable" and so on (Ganty 2025: 171)—even in cases where there was a positive legal outcome for the applicant.

Queer theorists have long been attentive to the "understated" or "background" nature of heteronormativity and cisnormativity.[3] "Heteronormativity" refers to the societal privileging of (monogamous, reproductive) heterosexuality as the "normal" or ideal mode of sexuality (Berlant & Warner 1998: 548). "Cisnormativity" describes the assumption that sex/gender is binary and that identifying with the sex/gender one was assigned at birth (ie being cisgender) is the natural and superior mode of being (Larson 2025: 59). However, it should be noted these two regimes of normativity are intertwined, with the notion of being attracted to the "opposite" gender relying on the idea of there being a stable gender binary (Butler 1990: 30).

In her book, *Queer Phenomenology: Orientations, Objects, Others*, for example, Sara Ahmed argues that "heterosexuality functions as a background" insofar as it is both something that directs or "is behind" social actions and something that often "does not come into view" (Ahmed 2006: 87). In Ahmed's account, people are not born straight but rather "become straight" and a "field of heterosexual objects" helps to bring them "into line" with heteronormative expectations. The prominence of certain objects, such as wedding gifts and family photos in the home, or the repetition of scenes, such as a resort lined with "[t]able after table" of heterosexual couples, can have a "straightening" effect by orienting us towards certain desires and away from others (Ahmed 2006: 82).

For the queer subject who is unable to, or refuses to, align themselves with the heteronormative values encoded into these objects or scenes, living their life against a "heterosexual background" can make them feel uncomfortable and out of place. When having dinner in the family home or holidaying at a resort, they may feel *dis*oriented, "shatter[ing] [their] sense of confidence in the ground or [their] belief that the ground on

[3] An early example of a queer theorist looking to the "understated" can be found in the work of Judith Butler, who emphasizes the ways in which the compulsory order of gender/sex/desire is largely rooted in the "mundane and taken-for-granted" world of significations (Butler 1990: 140).

which [they] reside can support the actions that make a life feel livable" (Ahmed 2006: 157).

Scholars have extended Ahmed's insights to cisnormativity, arguing that it too functions as a background, with disorienting effects for those who do not conform (Kondelin 2014; Sciullo 2019). For example, Nick Sciullo argues that for trans* and gender diverse people, seemingly insignificant spaces such as "[b]athrooms, changing rooms, and locker rooms all become sites of contestation over who counts as a person. Each space, each stall door is an opportunity for new thinking about body, relationships, and being" (Sciullo 2019: 687).

While Ahmed's notion of the "heterosexual background" and subsequent scholars' extension of this idea to the cisnormative background are focused on how physical space is arranged, their accounts are instructive for thinking about the work that the messages embedded in the judgment's form—or its "background"—can do in cases involving queer applicants. Just as a wedding photo on the wall can send a message about the way one "ought" to live one's life, even in spaces in which the queer person is permitted to enter, a judgment with heteronormative or cisnomative values woven into its use of language or summary of the facts can reinforce those values, even in a case where the legal outcome is ultimately positive for a queer applicant. In such a case, the form of the judgment may have a disquieting and disorienting effect on the queer applicant, who is reminded of how their life or body is out of alignment with the "normal" order of things.

The effects of a judgment's form can also travel far beyond the discrete dispute to which the court is responding and the individuals and groups involved therein. Judgments are public-facing documents. In addition to communicating the result of the judicial process to the parties and their counsel, a judgment addresses, and may be consumed by, the broader legal community, including other lawyers, judges, legal academics, and law students, as well as the media and public more generally (Rackley 2010: 47). These public documents are also imbued with a certain authority, which comes from both their carrying of the law and the social prestige afforded to judges (Ganty 2025: 175). To the extent that a judgment's use of storytelling, language and style encodes a message or idea, then, it can help to spark and reinforce broader social narratives, becoming part of the normative backdrop against which we live our lives (Ganty 2025: 175). In this way, judgments that reproduce and reinforce norms relating to gender and sexuality can have a "straightening" effect on society more generally, helping to bring those who come into contact

with them "into line" with certain values and contributing to the "out of placeness" experienced by those who do not conform with those values.

These wider social effects are even more pronounced when it comes to the ECtHR, which not only enjoys a particularly large audience as a result of it having jurisdiction over the now 46 member states of the Council of Europe, but is also often depicted as "the conscience of Europe" (Council of Europe 2010), giving an additional "moral" and "cultural" weight to its judgments. As Paul Johnston puts it in an article on the impact of the ECtHR's case law relating to (homo)sexuality, "the Court must be regarded as one of the most important discoursing machines in the world since it produces a pan-European legal framework for adjudicating on matters of sexuality" (Johnson 2010: 74). In our view, the ECtHR's judgments play a similar role when it comes to gender (identity). In the following sections, we illustrate the personal and social effects that flow from the form of ECtHR judgments through a queer reading of its use of language and narrative in cases relating to transness and gender diversity.

[C] CISNORMATIVE LANGUAGE AND NARRATIVE IN ECtHR JUDGMENTS

Misgendering

One of the ways in which the form of a judgment can project cisnormative values, regardless of the outcome of the case, is through misgendering. Misgendering refers to "the imposition of terms, honorifics, names, or pronouns at odds with a referent's gender" (McNamarah 2021: 2252). It also encompasses "the failure to use terms, honorifics, names, and pronouns in line with a referent's gender" (McNamarah 2021: 2252).

Historically, the ECtHR appears to have sought to avoid misgendering trans* applicants, albeit not always very successfully. Originally, this came in the form of the ECtHR using one set of pronouns to describe the applicant in their early life and then switching to the applicant's desired pronouns at a later point in the summary of the facts. In *Rees v United Kingdom* (UK) (1986), for example, which concerned the UK's refusal to update a trans man's birth certificate to match his gender, the ECtHR began by using feminine pronouns to describe the applicant and continued this practice even through its description of the applicant's use of gender-affirming treatment (paragraph 12). The ECtHR then switched to masculine pronouns at the point at which the applicant legally changed his name (*Rees v UK* 1986: paragraph 13; see also *Van Oosterwijck v Belgium* 1980). While this approach might be preferable

to using the incorrect pronouns throughout, the use of pronouns with which the applicant does not identify at any point in the judgment still constitutes a form of misgendering.

Following *Rees*, the ECtHR's approach changed. In *Cossey v UK* (1990), which involved a trans woman, the ECtHR began by noting that the applicant had been "registered in the birth register as a male" (paragraph 9). However, at the first point at which the ECtHR used pronouns, it adopted the feminine form, stating, "[a]t the age of 13 the applicant realised that she was unlike other boys" (paragraph 10). In *X, Y and Z v UK* (1997), the ECtHR went even further in its efforts to use the applicant's correct pronouns, describing him from the outset as "female-to-male transsexual" who "will be referred to throughout this judgment using the male personal pronouns "he", "him" and "his"" (paragraph 12).

In these early cases, the applicants were not legally registered as their lived gender and the ECtHR held that they did not have a right to be so registered under the ECHR. Nevertheless, the ECtHR still made an effort to use the pronouns that reflected the applicants' identity and lived experience. In this way, the form of these judgments projected a more inclusive air than their substance, at least when it came to pronoun use. While the applicants were ultimately unsuccessful, the ECtHR's use of their correct pronouns may have at least allowed them to feel seen and respected.

The messages encoded into the form and substance of the ECtHR's judgments regarding gender identity eventually came into alignment in *Christine Goodwin v UK* in 2002. In that case, the ECtHR not only referred to the applicant, who was a trans woman, as "she" from the outset (paragraph 13), but also held that the British authorities' failure to legally register her gender identity constituted a violation of her rights under the ECHR (paragraphs 83, 104). This set the tone for the ECtHR's engagement with issues relating to gender identity over the next decade or so.

However, in a handful of more recent decisions, the ECtHR has departed from this approach. In *AP, Garçon and Nicot v France* (2017), for example, which concerned France's refusal to recognize the gender identity of three trans women on the basis that they had not sufficiently demonstrated that they had undergone a change in physical appearance of an "irreversible nature", the ECtHR opted to use the masculine form to describe the applicants throughout its judgment. This was so, despite the ECtHR going on to find in favour of two of the three applicants, holding that the requirement for trans* persons to undergo "sterilisation surgery

or medical treatment entailing a very high probability of sterility" (*AP, Garçon and Nicot v France* 2017: paragraph 135) in order to have their gender identity recognized constituted a violation of the right to private life under Article 8 of the ECHR.

In *AP, Garçon and Nicot*, the ECtHR justified its use of masculine pronouns on the grounds that three applicants were legally registered as male:

> On the date of lodging of the applications, the applicants were regarded for civil-law purposes as belonging to the male sex. For that reason, the masculine form is used in referring to them; however, this cannot be construed as excluding them from the gender with which they identify (2017: paragraph 6).

This approach and justification were then repeated in relation to the non-binary applicant in the ECtHR's 2025 judgment in *TH v Czech Republic*, as described in the introduction. The ECtHR's increasing emphasis on legal gender over self-identity when it comes to pronoun use may be the result of the increasing politicization of transness in Europe since the mid-2010s (Lavizzari & Beyer Gregersen 2026), combined with a growing backlash against the Court, which has resulted in the ECtHR taking a more deferential approach towards the member states' laws and policies (Stiansen & Voeten 2020).

There are also recent examples of ECtHR judges using the correct pronouns for an applicant but undermining their gender identity in other ways. For example, in her concurring opinion in *AM and Others v Russia* (2021), Judge Elósegui referred to the applicant as the "biological father" (2021: Judge Elósegui, paragraph 12), despite using the pronouns "she"/"her" elsewhere in the opinion (eg 2021: Judge Elósegui, paragraph 1). This constitutes misgendering insofar as it still involves the use of gendered signifiers to describe the applicant, which were inconsistent with her lived gender.

The practice of misgendering is sometimes trivialized (McNamarah 2021: 2260). Reasons for this trivialization might lie in the fact that it often involves the use of "benign words", rather than slurs, which can seem semantically empty (McNamarah 2021 2237). However, the adverse effects of misgendering are real and well documented. Misgendering is often experienced as humiliating, disrespectful, and constituting a form of "symbolic subordination" that deprives a person of safety, privacy and even their humanity (McNamarah 2021: 2265). Frequent misgendering is associated with low self-esteem and gender dysphoria (Howansky & Ors 2022: 1027; Jacobsen & Ors 2023: 817) and is considered to have

a harmful impact on the addressee's mental health (Jacobsen & Ors 2023: 817). It has been described as giving rise to form of "gendered disorientation", which can produce "feelings of self-hatred and hatred of one's gendered body parts as well as frustration and helplessness" (Kondelin 2014: 37).

Furthermore, the ECtHR's practice of misgendering applicants in its judgments may have broader social effects. Specifically, it could prompt readers to question the "realness" of trans* identities and, in those cases where the ECtHR used legal status as its justification for its misgendering, reinforce the idea that law matters more than lived experience.[4] In this regard, while the ECtHR's recent practice of misgendering may appear as a small or "background" feature of its judgments, particularly in those cases where the applicant was otherwise successful, it can have significant and harmful effects, both on the applicant and society at large.

Deadnaming

Another way in which the form of a judgment can reflect cisnormative values is through the practice of "deadnaming". "Deadnaming" refers to the use of a trans* person's previous name, which they have rejected—hence, a *dead* name (McNamarah 2021: 2254; Lane 2025b: 1015). This is often the name a trans* person was given or assigned at birth and is associated with a gender other than the one with which that person identifies (McNamarah 2021: 2255; Nielsen & Ors 2023: 1181).

In its early judgments dealing with transness, the ECtHR sometimes used the applicant's dead name more than it did their actual (chosen) name. In the case of *Van Oosterwijck v Belgium* (1980), for example, the ECtHR used the applicant's dead name four times in its account of the procedure and the facts (paragraphs 1, 7-9, 12). In contrast, it referred to the applicant's actual name, Daniel Van Oosterwijck, only once, when explaining the changes he had requested to his birth certificate (which had subsequently been refused by the domestic authorities) (paragraph 12). For the remainder of its judgment, the Court then opted to use a degendered initial ("D"), which could apply to both the applicant's deadname and his actual name.

As time went on, the ECtHR began to use trans* applicants' actual names as the main way to refer to them throughout its judgments. This

[4] For a critique of the way in which "gender is one of the last remaining state-assigned, and supposedly stable and permanent, 'characteristics' of a person that remains explicitly registered as a key element of one's *legal* 'identity' in most countries around the world", see (Baars 2019, original emphasis).

may have been because, unlike the applicant in *Van Oosterwijck v Belgium*, those names were often the applicants' legal names in subsequent cases. However, throughout the 1980s and early 1990s, the ECtHR still frequently referred to trans* applicants' dead names in the summary of facts. In both *Rees v UK* (1986) and *Cossey v UK* (1990), for example, the ECtHR went out of its way to specify the name under which the applicant had been registered at birth at the beginning of the facts (*Rees v UK* 1986: paragraph 12; *Cossey v UK* 1990: paragraph 9), before describing the applicant's legal name change and then using that name to describe the applicant thereafter (*Rees v UK* 1986: paragraph 13; *Cossey v UK* 1990: paragraph 10).

It was not until the 1998 case of *Sheffield and Horsham v UK* that the ECtHR began referring to trans* applicants by their actual name from the outset and avoiding any reference to their dead name when describing a legal name change. For example, in relation to the first applicant in that case, who was a transgender woman, the ECtHR opened with the line: "Miss Kristina Sheffield, is a British citizen born in 1946 and currently resident in London" (paragraph 12), before noting that in the 1980s, she had "changed her name by deed poll to her present name. The change of name was recorded on her passport and driving licence" (*Sheffield and Horsham v UK* 1998: paragraph 13). In *Christine Goodwin v United Kingdom* (2002), in which the ECtHR finally recognized a right to change one's legal gender, the Court did not even mention the applicant's change of name in the facts. Instead, it only becomes apparent when the ECtHR describes the deadnaming to which the applicant had been subject: "She has received letters from the DSS addressed to the male name which she was given at birth" (*Christine Goodwin v UK* 2002: paragraph 18). These examples demonstrate the ease with which deadnaming can be avoided.

Deadnaming is now rare in the judgments of the ECtHR. This may be because it has come to the view that there is seldom a legally relevant reason to specify an applicant's dead name in the facts (on why this information is often irrelevant, see Molloy 2019). An increase in anonymous judgments in gender identity-related matters before the ECtHR, whereby the applicant is referred to using initials or a pseudonym throughout the course of the judgment (rule 47(4), Rules of Court), has also likely played a role in this shift.

However, the ECtHR still engages in deadnaming from time to time. In *Koutra and Katzaki v Greece* (2025), for example, the ECtHR used the dead name of one of the applicants twice in the opening paragraphs of the facts, before noting that the applicant "wishes to be referred to

as Anastasia Katzaki" (paragraph 2) and referring to her by that name thereafter. In *Savinovskikh and Others v Russia* (2024), the Court did not misgender the applicant or state any first name in the facts. However, in the judgment's appendix, the applicant's entire (dead) name at the material time is spelled out (Appendix).

Like misgendering, deadnaming is sometimes seen as a trivial matter. Yet, deadnaming trans* people often has a "visceral impact" (McNamarah 2021: 2255). Elek Lane writes that "[i]t can cause those who are deadnamed to wince or cringe and feel discomfort, or worse. It *hurts* to be deadnamed" (emphasis added, 2025a: 2). By contrast, the use of one's actual (chosen) name has been linked to better mental health outcomes in terms of reduced depressive symptoms, suicidal ideation and suicidal behaviour amongst transgender youth (Russell & Ors 2018: 505).

One reason why deadnaming can have such a negative effect is because it can constitute a form of misgendering where the dead name is associated with a gender with which the person does not identify, as is commonly the case (McNamarah 2021: 2255). In this way, deadnaming can give rise to the same "gendered disorientation" described in the previous subsection in relation to incorrect pronoun use. In addition, being called by a dead name may evoke painful memories associated with the time the person was known by that name and may have felt unable to be themselves (Lane 2025a: 10). But, perhaps most significantly, deadnaming undermines the linguistic authority and self-determination of a person who has made a clear decision about what they ought to be called (Lane 2025a: 13). For many, choosing a name more closely in line with their gender identity is an empowering process, which allows them to take control of their life and define who they are in the world. As one non-binary person describes it, choosing a name "was about choice, surviving, and giving myself agency. It's probably the only time I have ever made a choice that was just about me" (Corcione 2018). When a person or institution, including a court, challenges that choice by using the person's rejected name, it can thus take away a person's sense of power over their own life.

Pathologizing language

A third way in which the form of the ECtHR's judgments can make trans* and gender diverse people feel disoriented and out of place is by using pathologizing language and narrative. "Pathologization" describes "the act of unfairly or wrongly considering something or someone as a problem, especially a medical problem" (Cambridge Dictionary). In the context of

transness, it usually refers to the depiction of trans* people as having a mental illness or disorder (Theilen 2014: 332).

In the ECtHR's early decisions relating to gender identity, being trans* was regularly described as a "condition", which gave rise to "considerable problems" for the individuals concerned and could be "alleviated", at least to some extent, through "medical and surgical treatment" (*Rees v UK* 1986: paragraph 38). These descriptions largely reflected the state of medical and psychological science at the time, which classified "transsexualism" as a disorder. However, some ECtHR judges may have further contributed to the social perception that there was something "wrong" with trans* people through their own descriptions of them as sick, flawed and unfortunate.

In his dissenting opinion in *X, Y and Z v UK* (1997), for example, Judge Foighel stated, "[a] transsexual is someone who has been born different from others, someone who has been born with a 'defect'" (Judge Foighel, paragraph 10). In a similar vein, in his dissenting opinion in *Cossey v UK* (1990), Judge Martens said:

> Like Mr Rees, the applicant is a transsexual, that is she belongs to that small and tragic group of fellow-men [sic] who are smitten by the conviction of belonging to the other sex, this conviction being both incurable and irresistible (paragraph 2.1).

In both instances, the dissenting judges found in favour of the applicants. That is, in contrast to the majority, they were of the view that trans* people's inability to change their legal gender in the UK at the time amounted to a violation of the ECHR (*X, Y and Z v UK* 1997: Judge Foighel paragraph 10; *Cossey v UK* 1990: Judge Martens, paragraph 1.1). And yet, by describing them as "defective", "tragic" and "incurable", these judges created a "background" message, in which being trans* was presented "as something unusual, a deviation, a cause for concern – in short, an illness" (Theilen 2014: 332). In these statements, trans* people were not only made to seem unwell, but also an object of pity.

Although the ECtHR's use of pathologizing language in cases involving trans* people has decreased over time, it has not disappeared either. This is perhaps because a narrative of pathologization ultimately proved central to the ECtHR's holding that trans* people have a right to have their gender legally recognized in *Christine Goodwin v UK* (2002) (Theilen 2014: 329). In that case, the Court considered it significant "that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief" (paragraph 81) and observed that "[w]here a State has authorised the treatment and surgery

alleviating the condition of a transsexual, … it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads" (paragraph 78). Trans* identities also continue to be pathologized within medicine—only now under the psychiatric condition of "gender incongruence",[5] rather than "transsexuality" or "gender identity disorder" as it was previously labelled (MacKinnon 2018: 89).

One way in which the ECtHR continues to use pathologizing language is by simply employing the terminology of "transsexuality", "transsexualism", and "transsexual", as it still does from time to time. This now mainly occurs when the ECtHR is recounting decisions made by other institutions, such as courts or medical institutions. In this context, the ECtHR often uses quotation marks to distance itself from this terminology (see, eg, *WW v Poland* 2024: paragraph 41), but there are some examples where it has not done so (see, eg, *RK v Hungary* 2023: paragraph 26; *OH and GH v Germany* 2023: paragraphs 13ff, 54ff). There are also recent examples of judges on the ECtHR employing this terminology without quotation marks in their separate opinions (see, eg, *WW v Poland* 2024: dissenting opinion, Judge Wojtyczek, paragraph 3).

These terms are widely considered outdated and offensive by trans* communities due to their origination in the medical and psychological sciences and association with the condition that once held that name (GLAAD Media Reference Guide). Although some trans* people have reclaimed the term "transsexual" and use it to describe themselves (Leon & Ors 2025), many do not. As such, in cases where the ECtHR or individual judges on the Court opt to use this terminology and it is not how the applicant self-describes, it can import a pathologizing narrative into the "background" of the judgment, even in the absence of more explicit language relating to illness.

Pathologizing language and narratives can have a disorienting and disempowering effect on trans* people. This is because it creates a binary of "normal" and "abnormal", in which trans* people are placed on the side of "abnormal", contributing to their social marginalization (MacKinnon 2018: 75ff). One need only look to the example of homosexuality, which was previously classified as an illness but is no longer, to see the difference that (de)pathologization can make when it comes to social acceptance (Theilen 2014: 332ff). Further, the pathologization of trans* identities can push trans* people towards a medicalized process, in which they "become

[5] This is how it is classified in the *International Classification of Diseases 11* (ICD 11), which is a standard diagnostic tool published by the World Health Organization. The ECtHR itself addresses this change in terminology (*TH v The Czech Republic* 2025: paragraph 50).

positioned as disempowered patients, who require education and mental health support from (mostly) cisgender professionals" (Dewey & Ors 2023: 362). In this process, they may feel pressure to undergo surgical and other interventions in pursuit of a medical "fix" (Pfäfflin 2015: 23). In this way, pathologization can be seen as the opposite of self-determination. Instead of accepting and understanding diversity in its complexity, it projects a sense of disorder onto it (Singer 2006: 615), undermining people's ability to simply be who they are in the world.

Intimate details of surgery

The final issue that we will discuss in relation to the form of ECtHR judgments concerns the inclusion of intimate details about trans* applicants' bodies and medical history in the summary of the facts. In the ECtHR's earlier judgments relating to gender identity, there was a tendency to describe gender-affirming surgeries in detail. This sometimes entailed descriptions of applicants' genitalia, both before and after the relevant interventions. In *Cossey v UK*, for example, the Court noted that the applicant originally "had male external genitalia" (1990: paragraph 10). It then went on to describe in detail the various medical interventions and surgeries she had since undergone:

> In December 1974 the applicant, who had previously taken female hormones and had had an operation for breast augmentation involving implants, underwent gender reassignment surgery in a London hospital, to render the external anatomy nearer that of the female gender (*Cossey v UK* 1990: paragraph 11).

The ECtHR also included information from a medical report about the apparent "success" of these medical interventions, measured in terms of the applicant's ability to have heterosexual penetrative sex: "a genital examination showed her to have the external genitalia and vagina of a female. As a post-operative female transsexual, she is able to have sexual intercourse with a man" (*Cossey v UK* 1990: paragraph 11).

Queer legal theorists have suggested that the ECtHR's emphasis on surgery and other medical interventions in these early decisions stemmed from a concern with the authenticity of trans* identities (Sharpe 2010: 108; Gonzalez Salzberg 2019: 47). How far an individual was prepared to go in terms of modifying their body, and the apparent "sacrifices" they were willing to make along the way, came to serve as metrics for how serious a person was about their gender identity (Sharpe 2010: 108; Gonzalez Salzberg 2019: 47). This view of gender-affirming surgery as authentic "sacrifice" became more explicit in some of the ECtHR's subsequent judgments. For example, in *Christine Goodwin v UK*, the

ECtHR presented "the numerous and painful interventions involved in … [gender-affirming] surgery" as evidence of the applicant's transition being anything but "arbitrary or capricious" (2002: paragraph 81).

The Court's interest in applicants' genitalia, as well as the issue of whether they could engage in heterosexual penetrative sex following surgery, may have also been underpinned by a latent homophobia in the law at this time, which sought out opportunities to "heterosexualize" those who might otherwise present a challenge to sexual and gender norms (Gonzalez-Salzberg 2019: 49ff; Sharpe 2002; this echoes Ahmed 2006: 96). In addition, the ECtHR's inclusion of such intimate details in its summary of the facts was likely bound up with the pathologizing narratives described in the previous subsection, which cast trans* people as unwell and in need of a medical "fix" (Gonzalez Salzberg 2019: 47). This medicalized lens lends itself to the inclusion of medical details, regardless of their legal relevance.

Detailed descriptions of surgical interventions are now less common in the ECtHR's judgments. This is perhaps because the ECtHR has since recognized that making legal gender recognition for trans* people contingent on surgery is itself a violation of the ECHR, at least when it involves the possibility of sterilization (*AP, Garçon et Nicot v France* 2017), thus reducing the need to find evidence of bodily "sacrifice" in order to authenticate trans* identities. Nevertheless, the ECtHR does still occasionally refer to surgery and other medical interventions in more detail than appears to be strictly necessary. In *Savinovskikh v Russia*, for example, the ECtHR noted in the facts that "[o]n 21 July 2017 the applicant underwent a double mastectomy and all of his breast tissue was surgically removed" (2024: paragraph 13). This was so, despite the issue of whether or not the applicant's breast tissue had been removed being of marginal relevance to the question of whether removing children from a person's custody on account of them being trans* constitutes a violation of the ECHR, which was at issue in that case.

Having the details of one's body or medical history shared with the world via a court judgment can be embarrassing, humiliating and affect a person's sense of dignity. Trans* people have described being asked questions about their body by people who are not within their circle of trust as "sensationalizing our being transgender and not actually valuing or recognizing our personhood" (Finch 2017). It comes across as if trans* people owe the world "private or intimate details", in a way that cis people do not, and reduces trans* people to their bodies and medical history, rather than seeing them as full people (Finch 2017). Including such

details in public-facing judgments can also contribute to harmful social narratives, ranging from the pathologization of trans* identities and the idea that authentic transness entails some form of surgical intervention, to the notion that "transgender people exist for the entertainment, comfort, or curiosity of cisgender people" (Finch 2017). In this regard, it is a harmful practice, which should be avoided.

[D] AN ALTERNATIVE APPROACH: THE FEMINIST AND QUEER JUDGMENT PROJECTS

A queerer approach to the form of the judgment can be found in the multiple critical or alternative judgment projects that have taken place over the past two decades. Since 2006, there has been a proliferation of feminist judgment projects, including one focused on international law, which contains a section on the ECtHR (Hodson & Lavers 2019).[6] In these projects, legal academics, lawyers and activists rewrite existing judgments from a feminist perspective. In doing so, some contributors have drawn on insights from both feminist and queer theory (see eg Bengtson & Ors 2019). More recently, there have also been projects aimed at rewriting judgments from an explicitly queer perspective, including the 2025 *Queer Judgments* collection (Ferreira & Ors 2025; see also Sharpe 2017).

In addition to queering the substance of the law, many of these rewritten judgments also seek to queer the form of the judgment (Sharpe 2017: 421). For some contributors, this means dispensing with the genre of judgment-writing altogether. However, for others, it involves demonstrating how a queer-inclusive "background" message can be constructed within that genre so as to reduce its disorienting effects. These contributions constitute a valuable resource for thinking about how language and narrative can be used in judgments to "reorient" international law in ways that allow more queer people to "feel at home in it" (Holzer & Ors 2023) while still maintaining a judicial voice.

In the rewritten judgments relating to trans* and gender diverse people in these projects, practices of deadnaming and misgendering are nowhere to be found. This is so even in cases where one of the parties is legally registered as having a name or gender other than that with which they identify. For example, Carolynn Gray's rewritten version of the English case *R (On the Application of Elan-Cane) v Secretary of State for the Home Department* contains the following note on terminology:

[6] Note that there is also an alternative judgments project focused specifically on the ECtHR (Brems 2012) but it does not include cases concerning transness or gender diversity.

> The claimant self-identifies as non-gendered and, therefore, although legally registered as female, this judgment will refer to the claimant using the gender-neutral pronouns they and them. It is important that the court recognise and respect the identity of the claimant throughout, regardless of the decision being reached in relation to the obligations on the state to afford legal recognition of the claimant's gender identity (Gray 2025: 269).

The fictive benches also show a willingness to use multiple pronouns, if that is how a party identifies. For instance, the rewritten version of the Australian High Court's decision in *NSW Registrar of Births, Deaths and Marriages v Norrie* states, "Norrie uses the pronouns 'she/her' and 'they/them' and we will use both in this judgment" (Mazel & Ors 2025: 185). Applying this approach to a decision like *TH v Czech Republic* (2025) would entail the ECtHR asking the non-binary applicant for their preferred pronouns and using them from the outset, whether they be they/them, she/her or a mix of both.

The rewritten judgments relating to transness and gender diversity in the feminist and queer judgment projects also avoid pathologizing language. In Paul Johnston & Ors' rewritten version of the ECtHR's judgment in *Christine Goodwin v UK* in the *Feminist Judgments in International Law* collection, for example, rather than opening with a line about the applicant being a "post-operative male to female transsexual", as the original judgment did (paragraph 12), the fictive judges refer to her having "undergone male to female gender reassignment" (Bengtson & Ors 2019: 182, paragraph 1). Moreover, in addition to distancing themselves from the pathologization to which the applicant had been subject by using quotation marks around the term "diagnosed" (Bengtson & Ors 2019: 182, paragraph 2), the fictive judges explicitly call out this process: "[t]he Court notes that medical science continues to pathologize transsexuality" (Bengtson & Ors 2019: 185, paragraph 19).

Further, the rewritten judgments limit the disclosure of intimate bodily or medical details. In a number of examples, the fictive judges simply refer to a "sex affirmation procedure" (Mazel & Ors 2025: 186, paragraph 10) or "gender affirmation surgery" (Avgeri 2025: 243, paragraph 16) without going into greater detail. In others, the fictive judge seeks to explain the purpose of such medical procedures in a non-pathologizing way. For example, Carolynn Gray states the following in the summary of facts:

> The claimant underwent medical procedures … to alter their body in ways which enabled them to live comfortably, having experienced dysphoria as a result of living as, and being perceived by others, as female (Gray 2025: 261).

In a decision like *Savinovskikh v Russia* (2024), this approach would ideally entail the ECtHR omitting the reference to the applicant's double mastectomy or, if the Court found it necessary to its legal analysis for some reason, describing it in a self-affirming way. In this regard, the feminist and queer judgment projects constitute an archive from which the ECtHR and other courts can draw when considering how to approach language and narrative in their decisions concerning trans* and gender diverse people in a more queer-inclusive way.

[E] CONCLUSION

In this article, we explored the social and political effects that can flow from the form of the judgment through a queer reading of ECtHR decisions concerning trans* and gender diverse people. We argued that misgendering, deadnaming, the use of pathologizing language, and the inclusion of intimate bodily and medical details in judgments work to produce a cisnormative "background" message, which can have a "disorienting" effect on queer readers and a "straightening" effect on society more broadly. This is so, even in cases in which a trans* or gender diverse applicant was ultimately successful. However, as we demonstrated through reference to the feminist and queer judgment projects, the form of the judgment need not operate in this way. These projects demonstrate the ease with which cisnormative and trans-exclusionary language and narrative can be avoided without compromising the genre of judgment-writing. In this way, the feminist and queer judgment projects constitute a valuable resource for courts wishing to project a message of respect, inclusion and openness to diversity in both the foreground and the background of their judgments.

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Producing Sex: A Semiotic Genealogy of Trans and Non-Binary Exclusion in UK Law

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Abstract

Legal interpretation operates through rhetorical claims to discovery whereby courts purport to ascertain the meaning of language via the neutral application of interpretative rules developed and refined throughout legal education. This article demonstrates that such claims constitute Barthesian myth, a second-order semiotic operation in which contingent, historically produced meaning is presented as natural, self-evident, and innocent of its own construction (Barthes 1972: 129-130; Boer 2011: 218). This article will show that judicial interpretation, rather than discovering meaning, produces it, whilst simultaneously erasing the productive mechanisms through which interpretation operates.

Deploying semiotics through the work of Roland Barthes (1972), Charles Sanders Peirce (Hartstone, Weiss & Burks (eds) 1931-1958), and Eco (1976), Foucauldian genealogy (Foucault 1978), Butlerian performativity theory (Butler 1990), and Elena Gambino's (2020) account of recursive power, this article traces the discursive production of sex across UK jurisprudence from *Corbett v Corbett* (1971) through *R (Castellucci) v Gender Recognition Panel* (2025) KB 577 and *For Women Scotland v Scottish Ministers* (2025). This genealogy illuminates discontinuity rather than continuity: the signifier "sex" emerges through contradictory epistemic regimes, each asserting access to a stable, pre-legal truth. Notably, the deliberate linguistic conflation of sex and gender in the Gender Recognition Act 2004, designed by its drafters purely and simply to confound future debates, exemplifies the productive rather than declaratory character of legal language and *For Women Scotland*'s declaration of plain biological meaning accomplishes what Charles Stivale (2002: 465) terms "revolutionary ex-nomination", naturalizing contingent interpretation whilst occluding over two decades of divergent juridical practice.

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Castellucci demonstrates what is at stake: non-binary subjects rendered legally impossible through law's iterative performance of binary categories, compelled to present what Mairead Losty and John O'Connor (2018) term a "false self" based on biological sex whilst concealing their experienced identity. This semiotic critique exposes judicial interpretation's concealment of productive power, revealing how claims to discovery constitute violence against lives unintelligible within law's binary framework.

Keywords: semiotics; legal interpretation; trans law; non-binary; Barthes; Foucault; Butler; UK equality law; gender recognition.

[A] INTRODUCTION

This article investigates how United Kingdom (UK) judicial and statutory interpretation discursively produces "sex" as a binary biological category rather than passively discovering a pre-social reality. The central research question asks how legal speech acts and interpretive mechanisms in UK law performatively construct binary sex, and what semiotic and material consequences this construction holds for non-binary subjects. The article argues that, when courts claim to retrieve a plain biological meaning of sex, they execute a Barthesian mythologization that conceals a normative political choice behind the mask of nature. Throughout an authoritative, institutional speech act, judicial interpretation performatively materializes the binary while producing non-binary individuals as legally impossible and statutorily unprotected.

This article contributes to queer legal theory and socio-legal scholarship by synthesizing three distinct critical traditions into a unified analytical framework. While previous scholars have examined medical gatekeeping in early trans jurisprudence or the limitations of gender recognition legislation (Sandland 2005; Sharpe 2007; 2009; Gonzalez-Salzberg 2014), this study extends that literature by uniting Roland Barthes' semiotic myth-critique, Michel Foucault and Elena Gambino's theories of recursive power, and Judith Butler and Lila Braunschweig's accounts of performativity and the tyranny of legibility. Applying this theoretical triad allows the article to offer an up-to-date critical assessment of recent landmark rulings, bridging the gap between abstract legal theory and the lived material realities of non-binary subjects.

Semiotics provides an essential methodological lens for analysing queer and trans jurisprudence because judicial interpretation operates

fundamentally as a system of signs (Barthes 1972; Kevelson 1988; Stachowiak 2022). Legal adjudication does not merely read plain words from statutory texts; it assigns specific meanings to signifiers such as "sex", "man", and "woman". A semiotic approach unmasks how judicial discourse robs language of its historical contingency, transforming social choices into self-evident biological facts through what Barthes terms ex-nomination (1972). By analysing court judgments as semiotic operations, this article exposes how claims to scientific neutrality and ordinary meaning function as ideological mechanisms that insulate normative exclusions from public critique.

To trace the evolution of this semiotic regime, four key jurisprudential moments in UK law have been selected for analysis. First, *Corbett v Corbett* (1971) represents the founding medical-biological determinism that established chromosomes, gonads, and genitalia as the exclusive markers of legal sex. Second, the Gender Recognition Act 2004 GRA demonstrates a human rights compromise wherein section 9(1) strategically conflated sex and gender to enable binary legal transition. Third, *R (Castellucci) v Gender Recognition Panel* (2025) marks the explicit judicial foreclosure of non-binary status, holding that non-binary recognition falls outside judicial competence. Fourth, *For Women Scotland Ltd v Scottish Ministers* (2025) exemplifies the complete mythologization of sex, with the Supreme Court inserting "biological" into statutory definitions of "woman". Together, these four cases span fifty-five years of jurisprudence, providing a comprehensive genealogical map of how legal sex has been constructed, contested, and foreclosed.

This article is structured in four parts. Part [B] establishes the theoretical triad, articulating how Barthesian myth-critique, Foucauldian genealogy and recursive power, and Butlerian performativity intersect. Part [C] executes a semiotic genealogy across the four jurisprudential moments demonstrating how judicial interpretation shifts between competing epistemic regimes. Part [D] analyses the three axes of judicial violence inflicted on non-binary subjects, detailing the compelled performance of a "False Self", the two-stage statutory foreclosure, and the medicalization paradox (Losty & O'Connor 2018; Murawsky 2023; Braunschweig 2024). Finally, the concluding section synthesizes the article's findings and proposes Barthes' concept of the "Neutral" of a conceptual horizon for reimagining legal intelligibility beyond binary closure.

[B] THEORETICAL FRAMEWORK: MYTH, GENEALOGY, PERFORMATIVITY, AND RECURSIVE POWER

Barthesian myth and legal interpretation

Barthes developed his account of myth in *Mythologies* (1957) through close reading of the cultural phenomena of 1950s France: wrestling matches, detergent advertisements, the face of Garbo. Myth, for Barthes, is a second-order semiotic system. At the first order of signification, a sign is formed from a signifier (sound-image) and a signified (concept). At the second order, this first-order sign becomes the signifier of a new sign, and it is here that myth operates. Myth appropriates an existing sign and empties it of its history, filling it instead with a "natural" meaning that appears self-evident and eternal rather than historically contingent.

Roland Boer (2011: 213, 216) offers a technically rigorous account of this operation. Barthes, he notes, designates myth as metalanguage, "a second language in which one speaks about the first": myth is a secondary semiological chain, inherently parasitic, that builds its own system by appropriating the meaning-full[1] sign of the first system, emptying it out, and refilling it with new ideological content. The process is one of distortion: myth "hides nothing; its function is to distort, not to make disappear" (Boer 2011: 216, citing Barthes). Crucially, myth is characterized by inherent instability, moving back and forth between the sign on which it feeds and its mythic form, functioning, as Boer (2011: 218) observes, like an alibi, always pretending to be somewhere else so that, if one confronts the myth, it points to its denotative fact, and if one confronts the fact, it retreats behind the myth. This instability is precisely what renders myth resistant to exposure: the "pretence to naturalness and innocence is a cover for having stolen language" (Boer 2011: 229).

Charles Stivale (2002: 464-465) identifies the specifically political operation at the heart of Barthes' analysis through his recovery of the concept of "revolutionary ex-nomination". Myth achieves what Barthes terms "ex-nomination" (Barthes 1972), the operation by which the bourgeoisie, as the ruling class, hides its name to appear as "Nature" itself: through this process, historically contingent choices are rendered invisible and innocent, and the specific interests of those who exercise

[1] "Meaning-full" in this sense rather than "meaningful" because it is full of meaning referring to other signs and signifiers in the chain of linguistic meaning rather than meaningful in the sense of being important.

interpretive power become the universal standard. When ex-nomination proceeds by the resolution of a contested political moment, Stivale notes, myth accepts to wear a mask, to hide its name, and to distort itself into Nature (Stivale 2002: 465, citing Barthes). This concept is directly applicable to judicial claims to "plain meaning". Specifically, this article contends that courts present the historically produced meaning of "sex", assembled through specific decisions by institutional actors across distinct historical moments, as though it were self-evidently available within the text. Interpretation is thus staged as the mere retrieval of pre-existing meaning via legal method, concealing its true character as an active process of creation and production. This analysis is supported by Patrick Ffrench's reading of Barthes which draws attention to the political stakes of myth-critique: if Barthes' early structuralism is driven by the impetus to disengage everyday life from itself, to reveal the ideological upholstery that supports the what-goes-without-saying (Ffrench 2004: 293), then the project of legal semiotics is to perform the same defamiliarization upon legal discourse, to reveal judicial interpretation as a site of active meaning-production rather than passive reception.

To develop this further in the realm of judicial interpretation, Jan Broekman and Larry Backer, situating this within the tradition of legal semiotics, observe that lawyers operate as meaning-makers even as they present themselves as meaning-finders: "lawyers sensitive to the semiotic foundations of their work come to see and understand what they are told to do differently" (Broekman & Backer 2013: 26). Arguably, it is not just lawyers who operate as meaning-makers but also members of the judiciary in their interpretation of the law in question. This is reinforced by Kevelson's Peircean account of law as a system of signs, where meaning emerges through interpretive processes involving symbols, language, and social relations rather than through fixed definitions, which is in the same tradition, thus building a picture of a process of legal interpretation which is not science as taught in law school but rather an act of meaning-making and construction of society (Kevelson 1988; Broekman & Backer 2013). While neither tradition discussed here can accommodate the claim that "sex" possesses a timeless, pre-interpretive meaning awaiting discovery in statutory text, this is precisely the premise adopted by the Supreme Court in *For Women Scotland* when declaring that the term has a plain, biological meaning. To understand this further we must consider how the semiotic mechanics of "sex" as legal signifier repay examination. In Charles Sanders Peirce's triadic model, a sign consists of a representamen (the sign-vehicle), an object (what the sign stands for), and an interpretant (the meaning produced in the mind of the sign-user) (Peirce 1931-1935). The

crucial point is that the relationship between representamen and object is never fixed; it is mediated through the interpretant and is therefore culturally, historically, and institutionally contingent (Peirce 1931-1935; Eco 1976). Legal institutions constitute specific interpretive communities that stabilize meaning in particular ways, but this stabilization is an achievement rather than a given (Kevelson 1988; Broekman & Backer 2013). When courts pronounce on the "plain meaning" of "sex", they claim to be reporting the relationship between signifier and referent; what they are in fact doing is producing an interpretant within a particular regime of truth (Foucault 1980; Ffrench 2004).

In addition to this, Eco's concept of the "model reader" offers a complementary lens (Eco 1979). Every text presupposes a competent reader who will activate its meanings appropriately (Eco 1976; 1979). When courts invoke "ordinary meaning", they invoke an idealized competent reader, but this idealization is itself a construct (Eco 1979; Broekman & Backer 2013): it assumes a particular culturally located, politically positioned interpreter, and treats that assumption as natural (Barthes 1972; Ffrench 2004). The "ordinary meaning" of "sex" accessed by the ordinary reader is not universal; it is the meaning produced within a particular semiotic community at a particular moment, reading through particular ideological assumptions about what bodies are and what they mean.

Foucauldian genealogy, legal discourse, and recursive power

Michel Foucault's genealogical method offers a tool for tracing the historical conditions under which legal meanings emerge, compete, and are displaced (Foucault 1972; 1977). Where traditional legal history narrates development as progressive clarification, genealogy attends to discontinuity (Foucault 1980). It reveals that what presents itself as natural and continuous is in fact the contingent outcome of specific struggles between competing epistemic regimes, each making claims to truth (Foucault 1980; Ffrench 2004) and when we trace the case law on trans rights through recent history these competing epistemic regimes become evident; at different points in time courts could have taken different interpretative "pathways" which would have resulted in a completely different prevailing episteme of sex and gender. To develop Foucault specifically in legal discourse, Anne Wagner's analysis is directly relevant here (Wagner 2025), as she demonstrates, legal discourse functions as a regime of knowledge and power in which "law is a field in which knowledge is created, classified, and deployed through power-

laden mechanisms" (Wagner 2025: 14). Every legal utterance (every interpretation of a statute, every judicial holding) belongs to a regime of truth that determines what is sayable, by whom, and under what institutional constraints (Foucault 1980; Wagner 2025). This framework is crucial because it reveals how specific narratives achieve legal primacy through institutional gatekeeping. In litigation, such as *For Women Scotland*, the court's regime of truth determined not only what constituted valid evidence, but who possessed the authority to speak: while narrow biological and medicalized accounts were granted the status of natural expertise, trans and non-binary voices were systematically excluded from the evidentiary record (Phillips & Ors 2025). By controlling the boundary between authorized expert testimony and disqualified lived experience, legal discourse secures its plain meaning not by discovering objective facts, but by enforcing a procedural and epistemic closure (Foucault 1980; Ffrench 2004).

Legal discourse is not a neutral medium for conveying pre-existing facts; it is a productive formation that constitutes the very realities it purports to describe and Foucault's concept of *pouvoir/savoir*, power/knowledge, is central to this (Foucault 1980; Ffrench 2004). This concept designates the intertwining of discursive formation and institutional practice: knowledge does not exist outside power relations, and power is exercised through the production and management of knowledge (Foucault 1977; 1980). Applied to the legal production of sex, this means that juridical pronouncements on the meaning of "sex" are not merely epistemological (purporting to report what sex *is*) but are fundamentally ontological (constructing what sex is *made to be* through legal inscription) and political (authorizing certain understandings while foreclosing others) (Foucault 1980; Wagner 2025). This tripartite production operates distinctly across the jurisprudence traced in this article. First, in *Corbett v Corbett* the court performed an ontological fixing of sex through medical determinism, enshrining a chromosomal-gonadal-genital test at birth as a natural truth to insulate heteronormative marriage (Sharpe 2007). Second, while the GRA (following on from *Goodwin v United Kingdom* 2002) appeared to shift toward a human rights model, it maintained a medicalized gate, re-inscribing sex as a certificated, binary property (Sandland 2005). Third, in *Castellucci* the court exercised political foreclosure by declaring non-binary legal recognition beyond judicial competence, rendering non-binary subjects impossible (Murawsky 2023). Finally, in *For Women Scotland* the Supreme Court accomplished a full mythologization by declaring that "woman" carried a plain, biological meaning; an assertion that masks an active, normative choice behind

the guise of passive discovery (Phillips & Ors 2025). Across each moment in the genealogy of legal sex the court or legislature does not discover an antecedent biological reality; it actively deploys power to constitute the very legal categories it purports merely to discover and describe (Foucault 1980; Ffrench 2004).

To understand the precise structural mechanisms through which this judicial production operates across the case law, Elena Gambino's (2020: 221-222) theory of recursive power is particularly helpful. Hierarchies, she argues, do not merely repress pre-existing groups but "produce and police the very marginal subjects they require as their own premises", co-constituting the normative and institutional practices they presume by simultaneously generating "fit" subjects and those who are "not fit", whose exclusion retroactively legitimizes and secures the normative social order (Gambino 2020: 221-222). This is what Gambino (2020: 222) terms a "relation of ruling": power must generate marginal subjects whose subsequent exclusion or discipline then serves to legitimize the exercise of power itself. Applied to the legal production of sex, this theory reveals the non-binary subject not as a pre-existing identity that the law happens to overlook but as a figure actively produced by law's binary framework, whose "legal impossibility" performs the essential structural function of naturalizing and legitimizing the very binary that creates it (Sandland 2005; Gambino 2020; Murawsky 2023). Applied to the law discussed in this article, Gambino's framework reveals that the legal binary has never simply "found" non-binary subjects to exclude; rather it has recursively generated them as necessary marginal figures to legitimize its own binary authority. So, in *Corbett* the court recursively produced the trans subject as an "unfit" or "monstrous" outlier whose legal invalidation was structurally required to elevate and retroactively legitimize the white, reproductive nuclear family as the sole "fit" legal subject (Sharpe 2007; Gambino 2020). The GRA created a "normative trans subject", one who commits to a permanent, binary crossing "until death" (Sandland 2005; Sharpe 2007). In doing so, the GRA recursively remaindered the non-binary subject as the "unrecognisable beyond" (Sandland 2005: 48), demonstrating how an ostensibly emancipatory stature reinscribes marginality by demanding binary conventionality (Gambino 2020: 226). In *Castellucci* the state operates as "Supreme Speaker", using "coercive legibility" to declare non-binary status "legally impossible" (Gambino 2020; Murawsky 2023). By framing non-binary recognition as a source of "moral difficulty" beyond judicial competence, the court actively produced the non-binary subject as an impossible figure whose exclusion retroactively "proved" that the legal system is binary by constitutional necessity (Gambino 2020: 222)

and in *For Women Scotland* the Supreme Court's judgment relied on generating trans and non-binary identities as structural impossibilities, using their exclusion to retroactively legitimize biological determinism as natural law (Ffrench 2004; Phillips & Ors 2025).

If Gambino identifies the political necessity driving this recursive production of marginality, Luca Siliquini-Cinelli exposes the specific epistemic-ontological machinery through which law executes it. Law's "epistemic-ontological connotations" (Siliquini-Cinelli 2025: 22) argues, operate through "regulatory frameworks of legal intelligibility" that perform the intellectual labour of "replacing life with knowledge". Through this process, the complex, lived reality of human sex and gender is compressed into the rigid legal binary of man and woman (Siliquini-Cinelli 2025; Osella 2022). Law does not passively reflect the world; it actively makes a world and, in making it, it forecloses all others (Siliquini-Cinelli 2025).

Butlerian performativity and the binary

Butler's account of gender performativity, developed in *Gender Trouble* (1990) and *Bodies that Matter* (1993), offers a third dimension of analysis. For Butler, neither sex nor gender is the expression of a pre-social biological substrate; rather, both are performatively constituted through the citational repetition of norms. Gender is not what one *is* but what one *does*, and what one does is constrained by the iterative force of normative citation: the constant reiteration of existing categories gives those categories their appearance of ontological solidity.

The implications for legal discourse are profound. When courts pronounce on the meaning of "sex", they do not merely describe an antecedent biological reality; they perform that reality into legal existence through an authoritative, institutional speech act (Butler 1993; Raj 2023). Far from being a passive observation of pre-existing facts, each judicial pronouncement constitutes an iterative performance that relies on the compulsory citation of binary norms to materialize legal subjects (Butler 1990; Gonzalez-Salzberg 2014). This performative production operates through three distinct citational mechanisms across UK jurisprudence: first through judicial decisions that equate "sex" with biological sex. In decisions spanning from *Corbett v Corbett* to *For Women Scotland*, courts cite medicalized and anatomical markers as self-evident truths (Sharpe 2007; Phillips & Ors 2025). By repeatedly linking "sex" to chromosomes, gonads, or birth-assigned genitalia, judicial discourse naturalizes a contingent selection of physical traits, retroactively framing an interpretative choice as the passive retrieval of nature (Butler 1993;

Sharpe 2007). Second, through statutory interpretations which exclude certificated sex: In decisions such as *For Women Scotland* the Supreme Court performatively occluded section 9(1) of the GRA[2] by declaring a plain, biological meaning of sex. This refusal to treat certified sex as operative for the Equality Act 2010 is a citational operation that actively erases two decades of human rights development, enforcing biological determinism over legal status under the guise of statutory clarity (Phillips & Ors 2025). The third citational mechanism is through judicial refusal to recognize non-binary status. In *Castellucci* the court's determination that non-binary legal recognition falls beyond judicial competence acts as a citational foreclosure (Murawsky 2023; Tissandier-Nasom 2024). By repeating the assertion that the legal system is fundamentally binary the court does not discover an immutable constitutional limit; rather it performs the non-binary subject as legally impossible and unintelligible, enforcing binary closure through institutional repetition (Sandland 2005; Osella 2022).

Through these cumulative citational acts, the judiciary repeatedly enacts the gender binary, producing the appearance of an immutable, pre-legal ontology while erasing the very institutional machinery through which that fixity is constructed (Butler 1993).

This judicial performativity discussed above does not operate in a vacuum; its lived and material consequences are illuminated by Stef Murawsky's (2023) sociological account of non-binary accountability to transnormativity. Transnormativity, Murawsky demonstrates, is a "prescriptive ideology that legitimizes or invalidates transgender people's gender identities based on their adherence to the binaristic medical model of trans identity" (2023: 1). Functioning as an accountability structure, it produces normative expectations regarding "authentic" gender identity and generates pronounced ontological uncertainty in those whose identities resist master narratives (Butler 1993; Murawsky 2023). Non-binary people are therefore forced onto a precarious tightrope between sociocultural invisibility on one side and unintelligibility on the other (Murawsky 2023: 3). The medicalization paradox identified by Murawsky (2023: 5-6) is particularly significant here: accessing gender-affirming care to alleviate social dysphoria often produces binary misgendering, rendering non-binary identity *less* rather than *more* culturally intelligible, since binary-oriented medical interventions pull the body towards binary gendered legibility rather than the non-binary presentations subjects see (Butler 1993; Sandland 2005; Murawsky 2023).

[2] Which legislated that gender becomes for all purposes the acquired gender.

While Murawsky documents the structural and medical paradoxes of binary legibility, Mairead Losty and John O'Connor's (2018) psychoanalytic study provides clinical evidence of the subjective toll wrought by this institutional compulsion. Their research identifies a central theme of "being seen and unseen", a tension between the "True Self", the non-binary identity as internally experienced, and a world that mirrors only the "False Self", the biological sex assigned at birth, compelling individuals to present binary conformity while concealing their experienced identity (Losty & O'Connor 2018: 40-41). Crucially, this compelled concealment is not merely psychological or social; it is directly enforced by a legal framework that renders non-binary identity legally impossible and demands binary legibility as the price of legal recognition (Sandland 2005; Losty & O'Connor 2018; Murawsky 2023). Courts pronouncing on plain meaning actively weaponize this compulsion, treating the performatively enforced "False Self" as biological fact while banishing the experienced self to legal unintelligibility (Butler 1993; Raj 2023).

Braunschweig's (2024) feminist reading of Barthes illuminates the convergence of the Barthesian semiotic and the Butlerian performative perspectives. Drawing on Butler's (2004) analysis of David Reimer, who was subjected to medical intervention to resolve what clinicians construed as a "gender emergency", Braunschweig (2024: 183) identifies "the tyranny of legibility of sexual difference, the obligation to choose, no matter what side". This tyranny is institutional and social before it is legal; but it is through law that it is most definitively inscribed (Butler 1993; Braunschweig 2024). Barthes' (2005) later concept of the Neutral, the deliberate suspension of the binary paradigm and the refusal of the compulsion to take sides, offers an illuminating contrast to law's operation. Where the Neutral suspends the classificatory gesture that imposes rigid typologies upon subjects, law forcibly intensifies it, stripping language of nuance and naturalizing contingent social choices into statutory mandates (Barthes 1972; 2005; Braunschweig 2024).

Together these three theoretical traditions, the Barthesian semiotic myth-critique, Foucauldian genealogy and Butlerian performativity, provide a unified critical framework for deconstructing legal claims to plain meaning. Barthes (1972) exposes how legal discourse robs language of its historical contingency, turning constructed definitions into self-evident Nature. Foucault (1980) and Gambino (2020) reveal how legal regimes of truth recursively produce the non-binary figure as impossible in order to legitimize their own binary authority. Finally, Butler (1993), Murawsky (2023), and Braunschweig (2024) demonstrate how judicial

speech acts enforce a "tyranny of legibility", performatively materializing binary sex through iterative citation.

Part [C] of this article shifts from pure theory to empirical legal analysis. It traces how UK courts have interpreted "sex" across four key historical moments from the medical determinism of *Corbett*, through the certificated regime of the GRA 2004, to the judicial foreclosures in *Castellucci* and *For Women Scotland*, demonstrating that what purports to be the neutral, scientific retrieval of legal meaning is, in truth, an active and political act of semiotic creation.

[C] THE SEMIOTIC GENEALOGY OF "SEX" IN UK LAW

Deploying the theory above, the way in which the law through judicial interpretation of legislation or precedent does not "discover" the meaning of that which it is being asked to determine but rather is engaged in an active process of creating the meaning and then presenting that contingent determination as a natural discovery through the application of legal method, this section applies the theory discussed above to the four key points of analysis in question.

Corbett v Corbett (1971): medical determinism and the founding myth

The origin point for the legal construction of sex in modern English law is *Corbett v Corbett* (1971), decided by Ormrod J. Arthur Corbett sought a declaration of nullity of his marriage to April Ashley on the basis that the marriage was void because Ashley was male. Ormrod J, who possessed qualifications as a medical doctor and judge, held that the marriage was void on the basis that both parties were male at birth and at the time of the marriage despite Ashley having socially and medically transitioned to female.

Corbett held that sex, for the purpose of the English law of matrimony, was fixed at birth and to be decided by chromosomes, gonads and genital factors (Sharpe 2002; 2007). Psychological identity, social presentation and post-operative anatomical changes were explicitly excluded (Whittle & Simkiss 2019). Ormrod, J therefore laid down the legal test for sex determination in the UK albeit that the case was heard in a relatively low-level court, concerned a narrow point of English law and therefore, arguably, should not have become precedent across all of the jurisdictions of the UK. For the relevance of this article, the court in *Corbett* presented

this test of legal sex as the passive retrieval of medical fact. In semiotic terms, however, this operation was profoundly productive (Barthes 1972, Eco 1976). Ormrod J transformed biological factors into authoritative legal signs, executing what Barthes (1972) terms the secrecy of qualification (Stivale 2002). By selecting three congruent biological markers while discarding other, arguably also, relevant ones such as psychological identity and social reality, the court produced a specific version of "sex" while hiding its own constructive labour behind the authority of clinical science (Foucault 1980; Sharpe 2007).

In Foucauldian terms this case established the first epistemic regime of modern UK trans jurisprudence: a regime of medical-biological determinism where the body becomes a reality fabricated by a specific technology of power (Foucault 1977: 194). As Siliquini-Cinelli (2025: 22) observes, law operates through regulatory frameworks of legal intelligibility that replace lived experience with institutional knowledge. In *Corbett*, Ormrod J declared that over a very large area of law (most areas of law in fact) sex is an irrelevant factor, yet where sex mattered, for example specifically in matrimonial law, it required immutable biological grounding (Sharpe 2007; 2009).

Critical legal scholars have exposed the normative anxieties driving this biological fixation. Alex Sharpe (2002; 2007) demonstrates that Ormrod J's test was infused with homophobic panic, designed to protect the institution of marriage from same-sex unions. By evaluating Ashley's post-operative body as an artificial cavity and scrutinizing her capacity for vaginal penetration, the court revealed an aesthetic and phallocentric concern to preserve heterosexual naturalness (Sharpe 2007). The court used a biological grid to enforce what Butler (1990) terms the heterosexual matrix, ensuring that legal personhood remained bound to reproductive heteronormativity (Croce 2018).

What *Corbett* foreclosed is as significant as what it constructed. By fixing legal sex at birth, the judgment rendered trans transition and non-binary existence legally impossible (Sandland 2005; Whittle 2006). Ashley's experienced identity and social recognition as a woman were dismissed as legally irrelevant. In Peircian terms, the interpretant was institutionally frozen: the signifier of birth-sex dictated the referant, prohibiting subsequent physical or social inscription from altering judicial status (Peirce 1931-1935; Kevelson 1988). For over three decades *Corbett* functioned as an unassailable legal truth, demonstrating how judicial claims to neutral discovery successfully conceal the ideological upholstery supporting normative exclusion (Ffrench 2004; Whittle & Simkiss 2019).

The Gender Recognition Act 2004: human rights discourse, strategic compromise, and partial deconstruction

The medical determinism of *Corbett* was disrupted by the European Court of Human Rights in *Goodwin v United Kingdom* (2002). The Strasbourg Court held that the UK's refusal to recognize a trans woman's legal sex breached Articles 8 and 12 of the European Convention on Human Rights, forcing the UK legislature to enact the GRA 2004 (Sharpe 2009; Whittle & Simkiss 2019).

The GRA represented a major semiotic rupture (Sandland 2005). Under section 9(1), a trans person obtaining a Gender Recognition Certificate (GRC) achieved full legal recognition in their acquired gender. Where *Corbett* insisted sex was immutable and fixed at birth, the GRA established a statutory mechanism through which legal sex could be altered (Whittle 2006; Leng 2023). The epistemic regime shifted from strict medical determinism toward a human rights model, allowing personal gender identity to override birth assignment (Gonzalez-Salzberg 2014).

Critical legal analysis must account for the deliberate semiotic construction of the GRA. Stephen Whittle, an insider stakeholder who spent three years drafting the Act word by word, reveals that section 9(1) was an exercise in strategic political crisis management (Whittle 2006; Whittle & Simkiss 2019). Section 9(1) provides that, upon receiving a certificate, a person's gender becomes for all purposes the acquired gender, so that if the acquired gender is the male gender, the person's sex becomes that of a man, and if it is the female gender, the person's sex becomes that of a woman.

Whittle (2006: 268) confirms that the decision to conflate "sex" and "gender" within section 9(1) was implemented purely and simply to confound future debates (Whittle & Turner 2007). During drafting, Whitehall civil servants held that sex was a matter for scientists, whereas gender was viewed as social and subjective (Whittle & Simkiss 2019). To bypass pedantic debates regarding genital reconstruction, which were pushed by faith groups arguing that only a vagina made a woman, the state selected gender presentation as the defining moment (Whittle 2006).

Section 9(1) performed a performative speech act: it did not find a scientific truth, but instead made gender into sex in law (Whittle & Turner 2007: 8.7; Butler 1993). This strategic conflation served as a political concession to the evangelical Christian lobby (Whittle 2006). By legally changing a person's sex to match their gender, the state maintained

the outward appearance of heteronormative marriage without formally sanctioning same-sex unions (Sharpe 2007; Sandland 2005).

Despite its progressive features, such as dispensing with mandatory surgical requirements, scholars have exposed the deep conservative structures embedded within the GRA (Sandland 2005; Sharpe 2007). Sharpe (2007; 2009) demonstrates that a biological understanding of sex persisted as an obsessive subtext within the Act. To protect marriage from homosexual incursion, the GRA originally required married trans applicants to annul their marriages before receiving a full GRC (Cowan 2005; Sharpe 2007). Furthermore, section 12 maintained that legal gender recognition did not affect status as a biological mother or father, while amendments to matrimonial law made non-disclosure of gender history prior to marriage a ground for annulment (Sharpe 2007; Leng 2023). As Sharpe (2007: 80) argues, law's concern over non-disclosure re-inscribed the truth of the biological past as the ultimate legal reality.

Moreover, the GRA maintained a psychiatric gate, requiring applicants to secure a formal diagnosis of gender dysphoria from medical specialists (Sharpe 2009). This preserved a mental illness model of trans embodiment, demanding that individuals narrate themselves through clinical distress to achieve state recognition (Butler 2004; Davy 2011; Gonzalez-Salzberg 2014).

Ralph Sandland (2005: 50) highlights how the GRA enforced strict binary closure. By requiring applicants to demonstrate that they had lived in their acquired gender for two years and intended to remain in that gender until death, the state divided the trans community, rewarding binary lifers who committed to lifelong conventionality (Sharpe 2007). Using Gambino's (2020) theory of recursive power, the GRA produced a normative trans subject while remaindering non-binary existence as the unrecognizable beyond (Sandland 2005: 48) through the foreclosing of non-binary identity recognition and the clear wording that any resulting recognition under the Act was only to be as the sex opposite to that registered at birth; the normative trans subject being the person who fit the narrow "wrong body" trope and who sought to medically and socially transition for the remainder of their life and who had been "certified" as trans by the medical profession.[3] In that sense, the state's inclusion of binary trans individuals was achieved by defining non-binary identities as unthinkable, securing the binary gender order under a modernized human rights guise (Sandland 2005; Hines & Santos 2018; Gambino 2020).

[3] Through the requirement for evidence of diagnosis provided by medical professionals as part of the process of applying for a GRC.

R (Castellucci) v Gender Recognition Panel (2025): binary closure and legal impossibility

The limits of the GRA's human rights framework were tested in *Castellucci* (2025). The claimant, having obtained legal recognition as non-binary in California, moved to the UK and applied to the Gender Recognition Panel for a non-binary GRC. The Panel refused, issuing a certificate recording the claimant's gender as female. The Court of Appeal dismissed the claimant's judicial review, holding that the GRA 2004 rested on an immutable legislative assumption of a binary gender system (Murawsky 2023). The court declared that recognizing non-binary status was a legislative step rather than a judicial one (*Castellucci* 2025: paragraph 42).

Castellucci demonstrates the precise mechanism of legal production through foreclosure (Butler 1993; Gambino 2020). The court did not engage with whether non-binary gender exists in social reality. Instead, it treated non-binary status as legally unutterable within UK statutes (Siliquini-Cinelli 2025; Osella 2022). By repeating the assertion that the legal framework is fundamentally binary, the court executed a Butlerian citational act, performatively materializing binary closure while presenting its holding as a passive constitutional constraint (Butler 1993; Raj 2023).

In Gambino's (2020: 222) framework, recursive institutions produce and police the very marginal subjects they require as their own premises. In *Castellucci*, the court operated as the state's Supreme Speaker, deploying coercive legibility to refuse to name a reality outside its permitted code (Gambino 2020; Osella 2022). The court justified its restraint by enumerating the difficult moral questions non-binary recognition would raise regarding marriage, single-sex spaces, prisons, and parental roles (*Castellucci* 2025: paragraph 45).

As Murawsky (2023) and Elias Tissandier-Nasom (2024) argue, enumerating these administrative difficulties constructed the non-binary subject as an inherent source of social disorder rather than a bearer of fundamental rights. The court invented the non-binary figure as a site of legal impossibility whose exclusion retroactively legitimized the state's authority to define what constitutes a person and a sex (Gambino 2020: 226; Sandland 2005).

The court supported its holding by pointing to a lack of international consensus, noting that only a minority of Council of Europe states recognize non-binary identities (*Castellucci* 2025: paragraph 38; Tissandier-Nasom 2024). Deployed as a reason for restraint, this comparative survey functions as Barthesian mythologization (Barthes 1972; Stivale 2002). The court

presented the contingent state of international legislation as evidence that the binary is natural and self-evident, rather than acknowledging an ongoing political struggle over human rights recognition (Quinan & Bresser 2020; Osella 2022).

Furthermore, this reasoning occluded clinical and demographic facts, such as data from youth gender services showing a significant rise in non-binary identification (Twist & de Graff 2019). As Tissandier-Nasom (2024: 108) observes, one cannot protect what one does not recognize as existing. By refusing legal nameability, *Castellucci* enforced administrative violence, trapping non-binary individuals in a state of social death where they are recognized only through a performatively enforced False Self (Losty & O'Connor 2018; Murawsky 2023).

For Women Scotland v Scottish Ministers (2025): mythologization accomplished

If *Castellucci* closed the door on non-binary recognition, *For Women Scotland* (2025) accomplished a systematic mythologization of "sex" itself. The Supreme Court considered whether "woman" in section 212(1) of the Equality Act 2010, defined as a female of any age, included trans women holding a GRC for the purposes of public-sector gender balance targets. The Supreme Court held that "woman" in the Equality Act refers exclusively to biological females, ruling that the certificated sex interpretation produced statutory incoherence (*For Women Scotland*: paragraph 14; Leng 2023).

The decisive semiotic move occurred when the Court asserted that although the word "biological" does not appear in this definition, the ordinary meaning of those plain and unambiguous words corresponds with the biological characteristics that make an individual a man or a woman (*For Women Scotland*: paragraph 16). This sentence exemplifies Barthesian mythologization (Barthes 1972; Stivale 2002). The word "biological" is absent from the statutory text. Nevertheless, the Court inserted the biological referent as its self-evident correlate, presenting this textual addition as the passive discovery of plain language (Stachowiak 2022). The Court transformed a contingent biological symptom into an absolute legal signifier, executing a revolutionary ex-nomination that hid a normative political choice under the mask of objective nature (Barthes 1972; Stivale 2002; Siliquini-Cinelli 2025).

A core operation of Barthesian myth is the loss of the historical quality of things (Barthes 1972: 142). The Supreme Court achieved narrative closure by smoothing over twenty years of divergent legal, administrative, and

institutional practice (Whittle & Simkiss 2019). Prior to this ruling, official Equality and Human Rights Commission guidance, government policies, and judicial decisions had treated certificated sex under section 9(1) GRA as operative for Equality Act protections (Murray & Hunter Blackburn 2019; Sharpe 2020; Leng 2023). By declaring the biological meaning plain and unambiguous, the Supreme Court retrospectively erased this complex history (Barthes 1972; Ffrench 2004). Divergent practice was not critically reconciled; it was abolished. The Court presented its decision as the retrieval of an eternal truth that had existed since 2010, purifying the legal signifier of its historical instability (Barthes 1972; Stivale 2002).

The Supreme Court's assertion of a plain biological meaning has drawn intense critique from biomedical, decolonial, and legal scholars (Phillips & Ors 2025; Sharpe 2020). J Craig Phillips and colleagues (2025: 228) call narrow judicial definitions of sex absurd, demonstrating that defining sex solely through binary gametes or anatomical markers ignores the complex biological variability inherent in human development. Crucially, Phillips and colleagues (2025: 228) argue that binary conceptualizations of sex are rooted in colonial and puritanical understandings designed to retain power within cis-heteronormative male societal structures (Graaff 2025). By elevating a rigid biological binary to an immutable statutory command, the Supreme Court did not engage with neutral science; rather, it codified a colonial, essentialist ideology that excludes biological variation and social gender expression (Osella 2022; Phillips & Ors 2025).

The interplay between *Castellucci* and *For Women Scotland* creates a devastating two-stage foreclosure for non-binary subjects (Murawsky 2023). *Castellucci* closed the GRC recognition route by holding that non-binary gender falls outside the statutory frame, while *For Women Scotland* restricted the Equality Act exclusively to biological males and females, stripping non-binary people of protection as a distinct group (Sharpe 2020; Leng 2023).

Non-binary individuals are doubly erased: legally unnameable under the GRA and protected only to the extent that they misgender themselves within their birth-assigned biological sex (Schudson & Morgenroth 2022; Murawsky 2023). This double foreclosure exemplifies what Braunschweig (2024: 183) calls the tyranny of legibility, namely the compulsory obligation to choose a binary side as the prerequisite for legal existence. Where Barthes' (2005) concept of the Neutral seeks to suspend the classificatory gesture that forces subjects into rigid binaries, UK equality law forcibly intensifies it. By claiming to discover a plain biological meaning, the Supreme Court concealed its own productive

power, insulating a normative political choice from public critique while executing semiotic violence against those who exist beyond the binary grid (Barthes 1972; Butler 1993).

[D] THE VIOLENCE OF THE BINARY: NON-BINARY SUBJECTS AND LEGAL INTELLIGIBILITY

The jurisprudence traced across UK case law carries specific, tangible consequences that fall most heavily on those who exist outside the binary performed into legal being, including non-binary, agender, and genderfluid individuals. While *Castellucci* provides the most direct illustration, the problem is structural rather than case-specific. Gambino's (2020: 221-222) theory of recursive power provides the framework for understanding why binary legal closure is productive rather than a mere failure of accommodation. Hierarchies generate normative and deviant subjects to create specific surfaces of intervention for institutional management; co-constituting the normative and institutional practices by producing "fit" subjects and those who are "not fit", whose exclusion secures the normative social order (Gambino 2020). In the context of the legal production of sex, non-binary subjects are generated as the necessary outside that legitimizes the binary framework's claim to exhaustive authority. The court in *Castellucci* did not simply decline to assist non-binary people; it invented them as a source of "difficult moral questions" requiring legislative action, performing the recursive move identified by Gambino wherein the marginal subject's exclusion justifies the legal system's continued operation (Gambino 2020; Murawsky 2023).

Losty and O'Connor's (2018: 40-41) psychoanalytic research provides the clinical dimension of this analysis, identifying a central tension between being seen and unseen. Non-binary individuals experience visibility as gendered beings through the biological sex attributed to them by others, alongside invisibility as their experienced non-binary selves. Individuals feel compelled to present a False Self legible within the binary grid, while concealing their experienced True Self. In *For Women Scotland* the Supreme Court's declaration of a plain biological meaning converts this clinical compulsion into a statutory command. To claim anti-discrimination protections under the Equality Act 2010, non-binary individuals are legally compelled to present their birth-assigned biological sex (Leng 2023). This forced presentation is an act of institutional violence in Butler's (1993) sense, representing the deliberate refusal of

legal structures to recognize a form of life as intelligible, real, or mattering (Butler 1993; Losty & O'Connor 2018; Braunschweig 2024).

Murawsky's (2023: 3-5) sociological research identifies the specific mechanisms through which binary legal frameworks and medicalized gatekeeping generate pronounced ontological uncertainty. Master narratives for understanding gender dysphoria, such as the wrong body trope and linear binary transition models, were designed for binary experiences and systematically misrepresent non-binary lives (Sharpe 2007; Murawsky 2023). Non-binary individuals report introspective doubt regarding the authenticity of their identity, a condition generated by the systemic failure of available diagnostic frameworks to accommodate non-binary experience. As Murawsky (2023: 4) notes, there is no definition for dysphoria that fits everyone; this definitional inadequacy reflects a diagnostic framework built for binary transitions rather than a neutral gap in clinical knowledge.

The medicalization paradox identified by Murawsky (2023: 5-6) is particularly significant for understanding the specific character of the violence inflicted by binary legal frameworks. For non-binary people who seek gender-affirming care to address social dysphoria, binary-oriented medical interventions may produce a different form of binary misrecognition. Interventions designed to address the dysphoria associated with being perceived as one binary sex masculinize or feminize the body to the point where the person is then misgendered as the opposite binary sex, substituting one form of binary misrecognition for another (Murawsky 2023). The law's demand for binary legibility, sustained by the GRA and reinforced by *For Women Scotland*, establishes an active system of coercive misrecognition in which available paths to legal and social recognition lead into the binary and away from non-binary identity (Sandland 2005; Leng 2023).

The interplay between *Castellucci* and *For Women Scotland* is particularly significant in this respect. *Castellucci* closed the non-binary recognition route through the GRA, while *For Women Scotland* further secured the binary by holding that the Equality Act 2010's protections operate exclusively through biological sex. Together, these decisions create a two-stage statutory foreclosure. Non-binary subjects cannot obtain recognition through the GRA, and their distinctiveness as a group is not protected by the Equality Act 2010, which recognizes only males and females. Non-binary subjects are doubly excluded, being legally positioned as not men, not women, and not legally nameable (Murawsky 2023). This double exclusion exemplifies what Braunschweig (2024:

183) terms the tyranny of legibility of sexual difference, enforcing the compulsory obligation to choose a binary side as the condition of legal existence. Where Barthes' (2005) concept of the Neutral seeks to suspend the classificatory gesture that forces subjects into rigid typologies, UK equality law forcibly intensifies it, concealing judicial power behind the mask of plain biological meaning while executing semiotic violence against those who exist beyond the binary grid (Barthes 1972; Butler 1993).

The genealogical perspective reveals that this construction is not inevitable. Rather, it is the contingent product of a specific configuration of legal intelligibility in which the binary is naturalized and everything outside it constitutes disorder (Foucault 1977; 1980; Siliquini-Cinelli 2025). The history traced across UK jurisprudence in this article demonstrates that this configuration has shifted across distinct historical moments, moving from the medical determinism of *Corbett* to the human rights framework of the GRA, and now to the biological determinism of *For Women Scotland* (Sandland 2005; Sharpe 2007; Phillips & Ors 2025). Each transition was presented by the judiciary as the passive discovery of what sex "really" means. In truth, each judgment represented an active renegotiation of power, determining which bodies and identities would be made legally intelligible within law's regulatory frame and which would be cast out into legal impossibility.

[E] CONCLUSION: INTERPRETATION AS PRODUCTION, PRODUCTION AS VIOLENCE

This article has argued that the judicial claim to discover the meaning of "sex", whether in Corbett's chromosomal test, the GRA's certificated framework, or *For Women Scotland*'s declaration of plain biological meaning, constitutes Barthesian myth. Each discovery is, in semiotic terms, a production: the construction of an interpretant within a particular regime of truth, presented as the neutral retrieval of a pre-existing referent. The productive character of interpretation is concealed precisely in the moment of its exercise.

The genealogy traced here reveals not continuity but discontinuity: three successive epistemic regimes, medical determinism, human rights discourse, and biological determinism, each claiming access to a stable truth that the others had failed to grasp. What each actually produced was a different version of "sex", legally different, with different inclusions and exclusions, different bodies made intelligible and different bodies rendered impossible. Crucially, as the analysis of the GRA's drafting history reveals, this production has at times been conscious and

deliberate: the architects of the Act crafted its language "purely and simply to confound future debates", performing what Boer (2011: 216) identifies as the characteristic operation of myth, building a secondary semiological system upon the first without acknowledging the construction. The recent trajectory has been towards biological determinism, but this trajectory is not the discovery of a pre-political truth; it is the outcome of a contested political struggle, enacted through the language of legal interpretation, its colonial and puritanical heritage concealed beneath the rhetoric of plain meaning (Phillips & Ors 2025: 328).

Gambino's (2020: 221) theory of recursive power extends the critique: legal pronouncements on sex are not merely descriptions of a biological given but citational acts that generate the marginal subjects, the legally impossible non-binary persons, whose very exclusion retroactively legitimizes the binary framework's claim to be exhaustive and natural. Each holding that reinforces the man/woman dyad is a contribution to the iterative performance through which that dyad acquires its appearance of ontological solidity. The courts are not neutral reporters of biological fact; they are active participants in the semiotic production of sex, and their participation carries the coercive force of legal compulsion.

The costs of this production are borne by those whose lives are unintelligible within its framework. Non-binary subjects, rendered legally impossible by *Castellucci* and doubly excluded by *For Women Scotland,* are the most immediate casualties. As Losty and O'Connor (2018) and Murawsky (2023) demonstrate, the violence is not only formal: it is experienced as the compulsion to present a False Self, the impossibility of being seen as one is, the systematic failure of available narratives to accommodate one's experience, and the ongoing ontological uncertainty generated by a world that recognizes only two genders and generates those who fall outside them as sources of difficulty rather than bearers of rights. The construction of non-binary subjects as a source of "difficult moral questions" in *Castellucci* is not a passive observation but a performative act: it names the non-binary subject as problem rather than person, and in so doing participates in the recursive production of marginality that Gambino identifies (Reisberg 2017: 708).

What does a semiotic critique demand? At minimum, it demands honesty about interpretation as production. Courts do not discover the meaning of "sex"; they choose, within institutional constraints, with reference to interpretive conventions, and against the backdrop of existing power relations, among competing possible meanings. Acknowledging this would not destroy legal certainty; it would locate legal certainty

where it actually resides, in the institutional authority of courts to resolve interpretive disputes, rather than in the fictional pre-existence of correct answers. Stivale (2002: 465) notes that myth loses its hold the moment its hidden construction becomes visible; the project of legal semiotics, in the tradition of Barthes and Ffrench, is to make that construction visible, to defamiliarize the what-goes-without-saying of judicial discourse, to reveal, as Ffrench (2004: 293) describes it, the ideological upholstery that supports the claim to discover what is, in fact, produced.

The semiotic project in law is, in this sense, continuous with the political project of trans and non-binary rights advocacy: it demands that law stop claiming to discover a binary that it has itself constructed, and start accounting for the violence that construction performs.

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Speaking Intimacy: Non-Monogamy in the Defence of Sexual Exploitation in Belgian Trafficking Case Law

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Abstract

This article examines how narratives of non-monogamies are mobilized in the defence of human trafficking for sexual exploitation in Belgian case law. Analysing three appellate judgments, it shows how defendants invoke polygamy, open relationships or multiple "marriages" to obscure coercion and contest criminal liability. While consent is legally irrelevant to the qualification of trafficking, it remains central to judicial reasoning on related sexual offences, creating tensions in cases involving intimate relationships. Drawing on queer, non-monogamy and "rough sex" scholarship, the article argues for moving beyond the "loverboy" anti-trafficking concept towards a contextual analysis of coercion embedded in intimate settings.

Keywords: human trafficking; sexual exploitation; loverboy; non-monogamy; consent.

[A] INTRODUCTION

At first sight, scholarship on human trafficking appears largely disconnected from research on non-monogamous relationship practices. Yet this article presents three recent Belgian criminal cases in which forms of non-monogamy were explicitly invoked. All three cases resulted in convictions for human trafficking for sexual exploitation,

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but defendants argued against these convictions due to, in their view, consensual non-monogamous relationships. Although these cases may appear anecdotal, they reveal how certain forms of intimacy can be instrumentalized both to rationalize coercion and to obscure the dynamics of exploitation.

The settings of these cases raise the question of consent. Yet, consent is irrelevant for the qualification of human trafficking. The European Union (EU) Anti-Trafficking Directive 2011 (Article 2.1) defines human trafficking as a process (including the recruitment, the transportation, the accommodation, etc) committed through coercive means (such as violence, fraud, deception or abuse of a position of vulnerability) for the purposes of exploiting individuals. Coercive means are not required when survivors are minors, considering that they cannot consent in any case to a process leading to exploitation (Article 2.5). Exploitation can take many forms (Article 2.2), primarily, according to victims' identification data, sexual and labour exploitation (Eurostat 2026). Slightly differently, in Belgium, human trafficking does not require the proof of coercive means (Article 258 of the New Criminal Code 2024, previously Article 344quinquies), as it considers that coercion lies in the conditions of exploitation (Clesse & Ors 2022: paragraph 187).

Consent is therefore irrelevant to qualify human trafficking, given, even if survivors do consent, such consent is void due to the commission of coercive acts (Article 2.4 Anti-Trafficking Directive 2011), or, in Belgium, due to exploitative conditions. This creates a disconnection with other forms of sexual offences, such as rape. In the Belgian definition of rape—as it is not harmonized at EU level (Rigotti 2022; Peršak 2025)—consent is the core element needed to prove the offence. Rape is indeed defined as "any deliberate act which consists of or involves sexual penetration of any nature, by whatever means, committed against a person or with the assistance of a person who does not consent to it" (Article 138 of the New Criminal Code 2024, previously Article 417/11). Yet, prosecutions for human trafficking may also involve prosecution for sexual offences, particularly rape. For instance, defendants in two of the three selected cases were also prosecuted for rape, leading to conviction in one case and acquittal in another. Among other forms of violence, sexual acts can be used by traffickers to coerce and maintain survivors in exploitative conditions, and human trafficking may result in rapes, particularly in the case of sexual exploitation (Ottisova & Ors 2016; Petrunov 2026).

The literature of consent and coercion in human-trafficking cases gives little insight into the intimate relationships between survivors and

offenders (Elliott 2016; O'Connor 2017; Albanese & Ors 2022). This article thus aims to answer the following research question: what is the role of consent, in different intimacy settings, in qualifying coercion, regarding sexual offences, or exploitation, regarding human trafficking? In light of Belgian judicial cases and by bridging the literature on coercion in different intimacy settings to the anti-trafficking literature, we first argue against the terminology of "loverboys" to conceptualize forms of (sexual) violence. Then, from a legal standpoint, we argue that the contextual analysis of exploitative settings surrounding work conditions and sexual relations through the offence of human trafficking enables us to identify and criminalize concomitant sexual violence, avoiding the risk of the notion of consent being instrumentalized.

Focusing on survivor–offender relationships, the anti-trafficking literature, mostly in Europe, has introduced the label "loverboy", a term that is used in the selected cases (section [B]). However, this literature centres on a narrow set of intimate dynamics typically involving young women and their exploiters. The first objective of this article is thus to decentre the loverboy debate from the profile of survivors and offenders, to rather discuss elements of exploitation or consent, the central elements to qualify human trafficking and sexual offences.

To this aim, this article uses three criminal judgments from Belgium in which judges convicted offenders for sexual exploitation, while: (1) other romantic relationships with the same offender or accomplices were not criminalized and (2) some offenders were acquitted for sexual offences (section [C]). These cases show that legally delineating "exploitative" and "consensual" relationships is not always straightforward, especially in legal settings where "consent" is not always relevant. While the irrelevance of consent in the legal qualification of human trafficking is often presented as a protective move, shielding survivors from evidentiary burdens and victim-blaming narratives, its operation in cases involving intimacy deserves closer scrutiny. By treating consent as legally immaterial, courts tend to analytically separate intimate relationships from the subsequent or overlapping exploitation, focusing almost exclusively on the coercive process and the conditions of work. This compartmentalization risks obscuring the ways in which sex, intimacy, and labour are intertwined in practice, particularly in contexts where the roles of intimate partner, client, manager, and exploiter overlap or shift over time. The second objective of this article is then to demonstrate that intimacy, more broadly than the concept of loverboys, can be strategically deployed as a tool of coercion and/or exploitation.

Furthermore, these three cases involve defendants and labelled "victims" who were engaged in non-monogamous relationships, framed as consensual. Such relationships refer to forms of various intimate relationship types where partners may have a number of romantic and/or sexual partners, in a way that is consented to by all partners (Barker & Langdridge 2012; Wdowiak & Ors 2024).[1] In these cases, such relationship forms appear as excuses for exploitation and abuse, risking the instrumentalization of queer or non-conforming relationships to conceal violence. The risk of consent being instrumentalized is not new to the literature on sexual violence. To contextualize and reflect on such risks, we draw parallels with emerging scholarship on the misuse of consent in kink and other queer relational norms to justify sexual assault (section [C]), highlighting the risks of such narratives for legal understandings of consent and exploitation. Therefore, the third aim of this article is to critically interrogate the increasingly prominent role of consent in the definition of sexual offences, such as rape, since consent—or relationships labelled as consensual—can be instrumentalized in ways that mask or minimize coercive and exploitative dynamics.

Through both the factual circumstances of the selected cases, which involve relationships characterized by the defendants as non-monogamous, and its engagement with queer and kink scholarship on sexual violence, this article advances a queer reading of consent in contexts of criminal exploitation. In doing so, it explores the extent to which the offence of human trafficking may provide a means of addressing the risk of instrumentalization of consent within criminal law. While decentring consent carries important risks, including restricting individuals' autonomy to engage in certain forms of work, such as sex work, or reinforcing assumptions that particular relationship structures, such as non-monogamous relationships, are inherently non-consensual, it also draws attention to the importance of context in assessing consent and to the continuity of coercive behaviours that facilitate exploitation.

Previous scholarship has shown that queer analyses of judicial decisions can generate alternative understandings of criminal law concepts,

[1] Consensual non-monogamy includes open relationships and polyamory, among other types. Open relationship refers to a relationship where partners agree to sexual interactions with third parties, but emotional bonds are reserved for the primary relationships (Barker & Langdridge 2012; Wdowiak & Ors 2024). Polyamory refers to an emotionally intimate relationship among multiple people who can also be sexual and/or romantic partners (Barker & Langdridge 2012; Sheff 2014). Polygamy is a legal status, in which an individual has formed a formal or religious marriage with various individuals; though as scholarship demonstrates, "polygamy" in Western legal and political discourse typically refers in practice to polygyny (one man married to multiple women), and the term's application varies considerably depending on race, nationality, and the legal regime in question (Heath 2023).

particularly regarding the decriminalization of same-sex relationships or certain sexual practices (Sharpe 2017; Ferreira & Ors 2025: part 1). Yet this literature has offered limited analysis of non-monogamous relationships and how they are understood within the judicial sphere.

Within the Queer Judgments Project, this article proposes a different reading of judicial cases addressing non-monogamies in the context of sexual exploitation and abuse. It examines legal positions and enforcement contexts that have received limited attention in traditional legal scholarship, particularly where allegations of human trafficking intersect with non-monogamous relationship structures. In doing so, it sets the traditional criminological framing of loverboys as offenders against queer and kink doctrines on consent and violence in intimate relationships. By centring consent and exploitation in factual cases, the article exposes the limitations of abstract legal concepts and opens avenues for further contextualizing them, including in relation to non-normative relationships.

While the selected cases might seem marginal, they offer a practical entry point for a queer, critical discussion of consent in criminal law. As a queer reading of these cases, the article aims to counter the norm of invisibility surrounding many non-monogamies—an invisibility reproduced by judges' scant attention to the topic in the cases at stake. We challenge that invisibility by dwelling in the margins and building bridges, guiding the reader toward new academic terrain.

[B] LOVERBOYS: AN OVERVIEW OF THE LITERATURE

The three cases presented below intersect with a longstanding concept in European anti-trafficking discourse, the loverboy method. The term gained visibility in the 1990s in the Netherlands, but the underlying practice is much older. Historical accounts describe similar tactics in the late nineteenth century, when young men in Amsterdam targeted recently arrived girls at the Central Station, seduced them, impregnated them, and subsequently pressured them into prostitution owing to the stigma they faced as unmarried mothers (Bovenkerk & van San 2011). Contemporary literature generally defines loverboys as pimps or traffickers who induce emotional attachment in young girls or boys as a means of establishing control (Aussems & Ors 2020).

The concept has since travelled extensively across Europe and appears in criminological studies, policy documents, and national reporting

mechanisms (Bullens & van Horn 2002; Von Günther & Ors 2011; van San & Bovenkerk 2013; Katona 2017; Baier & Ors 2019; Lavaud-Legendre & Ors 2020; Wallaert & Millet 2021; Lavaud-Legendre 2023; Klun & Frangež 2024; Agenția Națională Împotriva Traficului de Persoane 2024; Bundeskriminalamt 2025). Across these sources, the profiles of both offenders and survivors remain remarkably consistent.

Survivors are usually portrayed as very young, most frequently minors, often described through deficit-based narratives such as family instability, low self-esteem, naivety, or recent flight from home. Recruitment is commonly said to occur via social media. In such accounts, the relational dynamic rarely includes marriage, given the age of the survivors. The literature similarly portrays loverboys as young men, sometimes minors, who identify and strategically target vulnerable women or girls, positioning themselves as protectors or romantic partners. Sexual acts often serve to assert control, test obedience, generate blackmail material, or punish perceived disobedience. These mechanisms also function at the early stages of the relationship as part of the broader emotional manipulation strategy. Studies also note that loverboys often have prior criminal histories, including drug-related and property-related offences.

Studies also show that loverboys frequently maintain several relationships at once, which are sometimes rationalized using non-monogamous frameworks. One minor interviewee in Karijn Aussems and colleagues work stated: "[Youth leaders] think that men abuse me, but that's not true. I just was in an open relationship with two men" (2020: 6). Although scholars have long documented strategies involving marriage, childrearing, and competition among survivors, these dynamics have not been analysed from the perspective of the forms of intimacy invoked by offenders or, at times, by survivors themselves. In other words, the role of non-monogamy (and its narrative) in these coercive dynamics has remained largely unexplored.

In Belgium, the concept of loverboys has been recurrently examined by the Federal Centre for Migration (MYRIA), the national reporting mechanism on human trafficking. Its 2015 report already dedicated a full chapter to this phenomenon, reiterating many of the patterns described in the pre-existing literature (MYRIA 2015). The report focuses on minor survivors and on existing institutional responses for their protection. It highlights that survivors may not only minimize the violence they experience but also defend the offender. Only two cases in the report involved marriage as part of the loverboy strategy.

However, the loverboy concept has also been the subject of significant critique. Scholars warn that it can generate moral panic, amplified by media and political discourse (Bovenkerk & van San 2011; Baier & Ors 2019). They also question whether the vocabulary romanticizes and obscures the violence of trafficking. As several authors note, referring to "Romeo pimps" or loverboys risks glamorizing practices that are in fact deeply coercive, thereby masking the brutality of offenders and reinforcing stereotypes (Bovenkerk & van San 2011; Merodio & Ors 2020). Survivors themselves reject the terminology (Aussems & Ors 2020). The restrictive profile of loverboys and survivors has also been nuanced by Noemi Katona (2017), by focusing on adult sex workers' experiences with pimps instead of those of survivors. She presents the experiences of persons who entered the sex industry and later developed intimate relationships with pimps due to isolated environments and pressures imposed by the social structure of street-based prostitution. Her analysis, although bringing a nuanced perspective on the loverboy phenomenon, does not encompass the situations presented in this article. As will be explained below, adult survivors here do not conform to the stereotypical profile of victims of loverboys, nor do they bring a different perspective from a sex-work perspective, being forced into the sex industry following recruitment.

For these reasons, this article proposes shifting analytical focus away from the romanticized framing of such relationships and instead interrogating the role of consent and coercion in human-trafficking cases, particularly where non-monogamy is invoked to justify or obscure sexual violence and exploitation.

While there has been a body of scholarship using the term loverboy to frame a form of coercive sexual relationships/exploitation practices, the use of the term is limiting in that it assumes a specific type of relationship, particularly, affecting young girls as survivors. This article instead proposes to rely on knowledge of the practices within different intimacy settings—including non-monogamy and BDSM (bondage/discipline, domination/submission, sadism/masochism)—to use as a lens to better identify the line between "coercive" or "exploitative" and "consensual" relationships.

[C] NON-MONOGAMOUS LOVE AS A DEFENCE AGAINST COERCION

This section presents the three Belgian appeal judgments in which defendants invoked forms of non-monogamy as part of their defence in prosecutions for human trafficking for sexual exploitation. The first decision, number 2018/CO/1158, of the Antwerp Appeal Court of 25 April 2019 (Antwerp 2019), involved defendants claiming that their polygamous cohabitation arrangement precluded judicial scrutiny. The second decision, number 2020/CO/744 of the Antwerp Appeal Court of 16 June 2022 (Antwerp 2022), featured an allegedly open relationship used to obscure coercion within a broader pattern of exploitation. The third decision, number 2022/CO/61, of the Liège Appeal Court of 14 September 2022 (Liège 2022), concerned multiple simultaneous relationships framed as "marriages" to rationalize coercion. Taken together, these cases reveal how relational narratives can be strategically mobilized to contest or conceal exploitative practices and sexual violence, as explained further below. Furthermore, the analysis of the motives for which judges convicted for human trafficking brings light to the limited role of consent to qualify exploitation, leading to diverse solutions for concomitant sexual offences.

The authors acknowledge the use of the concept of "survivor" as better suited to label people who have experienced abuse and exploitation, to recognize their agency and empowerment (Dunn 2005; Lockyer 2022; O'Shea & Ors 2024), as it has been used previously. However, as this article focuses on criminal proceedings, the legal terminology of "victims" will be used in the following presentations of the judicial decisions.

Antwerp Appeal Court (2019)

The first case concerns three Romanian defendants convicted for human trafficking for sexual exploitation and for leading or participating in a criminal organization. No defendant was prosecuted for sexual offences. The first defendant acted as the leader, accompanied by his wife and his half-brother. None of the six adult victims participated in the proceedings nor received compensation, which could indicate that they did not self-identify as victims of exploitation.

Two defendants contended that their right to private life had been infringed, arguing that they lived in a polygamous arrangement "in a kind of commune with the other girls, knowing and helping each other in daily life" (page 13), which they claimed constituted a "free choice, which should

be respected by the government" (page 14). The court firmly rejected this interpretation, finding that the cohabitation pattern was imposed "in order to exploit the prostitution activities of Romanian girls in the most profitable way possible" (page 14). In balancing competing interests, the court held that the danger posed to the victims constituted a legitimate interference with the defendants' right to respect for private life. The court further stated that the declarations of love by two victims—one of whom had a child with the defendant and another who was pregnant—were irrelevant considering the exploitative circumstances.

The court indeed qualified the situation as of one of exploitation: extensive evidence demonstrated the defendants' control over all aspects of the victims' activities. They dictated the sexual services to be provided, set prices, collected and used the proceeds, and even lowered rates while requiring the women to work more. Surveillance and micromanagement were constant: the defendants instructed the victims on how to treat clients, when to sleep, how to dress, and restricted their access to phones and computers. They transported the victims, discouraged them from contacting the police, and subjected them to humiliation, violence, threats, and enforced drug use.

"Love" featured prominently in the coercive dynamic. One victim, the partner of the lead defendant, was compelled to manage other victims on his instructions and to travel repeatedly between Belgium and Romania at his command. She thus occupied a dual position as both victim and co-accused. Another victim migrated to Belgium knowing she would owe 30% of her earnings from prostitution, plus rent, to the offender. After developing romantic feelings for the lead defendant, she relinquished nearly all her earnings to him. This victim denied experiencing violence, but the evidence demonstrated multiple forms of physical violence, including repeated and forceful spanking.

The funds financed rent, the defendant's debts and gambling addiction, and the construction of a house in Romania. He promised the two aforementioned victims a room in this future house. The court stressed that none of the women had any guarantee they would ever be allowed to live there.

A different situation applied to the wife of the third defendant, who did not hand over her earnings. As she had been working voluntarily in the sex industry and her income was used for family expenses alongside her husband's, the court found no evidence of exploitation and concluded that she did not qualify as a victim in this case.

As the court focused on the working conditions of the victims, the role of consent was almost absent from the case. Even if the victims "gave their consent" to the offender to organize sexual services, it was "immaterial", given the circumstances of the case (page 18).

Antwerp Appeal Court (2022)

The second case involved two victims, one Russian and one Belgian, and a Belgian defendant convicted primarily of human trafficking for sexual exploitation and rape. The defendant was also convicted for similar offences against other women who were not plaintiffs in the proceedings.

The court found that the defendant targeted women already working in the sex sector or in vulnerable socio-economic situations, aiming to recruit them into prostitution either in his home or other locations. The court summarized his *modus operandi* as deliberately seeking out women "in trouble because of drug addiction, lack of money or the fact that they have no roof over their heads after leaving a partner", and then "rush[ing] to their aid by providing them with money, goods and/or shelter" (page 43).

The first Russian victim, the defendant's girlfriend, was already an escort. She met the defendant through her escorting activities and later began working for him. She stated that they maintained an open relationship in which both partners could have sex with others. This open relationship, however, was concealed from the defendant's new Belgian partner, one of the other victims. After the Russian victim became pregnant, she was asked to leave the shared residence. While denying any coercion or exploitation, she experienced repeated violence while working for the offender. For instance, after leaving the shared residence, she was threatened into continuing prostitution, especially under the threat that she would be denied access to her child. She was closely monitored, required to hand over her earnings, and dependent on the defendant, who controlled advertisements and pricing. The exploitation continued even after their relationship ended. The Russian victim also organized and monitored the other women on behalf of the offender, although she was not prosecuted for it.

The second Belgian victim had been coerced into prostitution by her former partner, a so-called loverboy (page 44), who was not prosecuted in this case. The defendant, who had been her client, offered her accommodation and work when she was homeless and financially distressed. He anally raped her as part of his routine of "trying" all the women he recruited. As the Russian victim directed much of the Belgian

victim's prostitution, a portion of the latter's earnings was indirectly passed to the defendant.

Another woman, who did not join the trial as a plaintiff, testified that the defendant had been her client before assuming financial and material responsibility for her following her divorce. She stated that she had fallen in love with the defendant. He proposed marriage and eventually forced her back into prostitution, although she was able to retain her earnings while contributing to household expenses. She later retracted these allegations in court.

As in the previous case, the assessment of guilt by the court excludes any analysis of consent, being "irrelevant", as well as the fact that the victims worked previously as sex workers (page 42). This strikes particular contrast with the following paragraph on the same page, where the court reaffirms that the qualification of rape is consent, which is nullified in coercive circumstances. Furthermore, human trafficking is qualified by the lack of "choice" due to the victims' precarious situations (page 43) and the control over their working conditions. The Russian victim had to notify the offender of her appointments, and failing to do so would incur physical violence. She had to hand over her earnings, amounts decided by the offender, who was controlling her online advertisements and arranged the appointments. The offender would hide in order to film some of her appointments and was similarly controlling towards the other victims. Conversely, he was acquitted of human trafficking of another person, whose prostitution activity was not proven.

While sexual relations between the Russian victim and the offender were recognized as contributing to their vulnerability and lack of possibility to leave the situation, the offender was acquitted of rape. The Russian victim "indicated at the hearing that no violence or coercion was used towards [her] and that everything happened with [her] consent" (page 51). Therefore, this sexual relationship was not penalized; only her exploitation led to conviction, given that consent is irrelevant here, as the financial and behavioural control takes precedence to determine the illegality of the situation.

Conversely, the court acknowledged that the sexual acts between the offender and the Belgian victim took place when she was particularly vulnerable, homeless and dependent on the offender for shelter and other financial expenses, leading her to accept "hard sex" (page 43). Therefore, the offender was first convicted for rape, due to coercive circumstances overwriting consent, and then for human trafficking, based on coercing

the victim back into prostitution and controlling, even indirectly, the conditions of her work.

Liège Appeal Court (2022)

The third case concerned one Senegalese victim party to the proceedings, and four offenders, two men and two women, convicted primarily for human trafficking for sexual exploitation and for leading or participating in a criminal organization. Additionally, two offenders, one man and one woman, were acquitted of rape against two victims, the second not joining the proceedings as a plaintiff. The lead defendant, a Belgian man, had previously been convicted for pimping, in a case in which he had been represented by the second male defendant, a lawyer.

According to the court, the lead defendant employed the loverboy method: he contacted the victim via Facebook, offered gifts and financial support, and professed affection. They married before her migration to Belgium. Upon arrival, she discovered that he was already in a relationship with two other women, including one of the female co-offenders. This woman had previously prostituted herself to reimburse her smuggler and had been giving half her earnings to the defendant once starting a relationship with him. She had a child with him, both as part of their relationship and to secure a residence permit. A second woman was also in a relationship with the offender and had a child with him. The defendant recruited the victim when this second woman became pregnant. All the women were tested for sexually transmitted infections upon arrival and were described collectively as the defendant's "three wives" (pages 24, 25). The victim was labelled "the third wife" (pages 21, 27).

The lawyer (second defendant) argued that the lead defendant had maintained multiple relationships in Senegal and that the victim was deeply in love with him. Once in Belgium, however, the lead defendant systematically isolated her from her social network and escalated his violence, in a pattern typical of domestic violence. She was raped by the main defendant and the female defendant (first "wife"), during orchestrated "threesomes" (page 32). The main defendant justified this conduct by asserting that he had a "big libido and this is not illegal" (page 27). Because the victim was undocumented, he planned to impregnate her to regularize her stay, a pattern already enacted with his other partners.

Although the first-instance court acquitted all defendants on the trafficking charge, the appeal court held that the conduct constituted trafficking for sexual exploitation. The appeal court did not rely on the

victim's use of a dating application in Belgium on the request of the offender, in which she rejected offers for paid sex. Instead, it focused on the forced sexual acts involving the lead defendant and his first "wife". Indeed, since 2013, the Belgian trafficking definition includes exploitation for the purpose of satisfying the offender's own sexual desires. In this case, the victim was made sexually available to the defendant and his partner, satisfying the statutory requirement.

By contrast, the prosecution for rape is only supported by the declaration of the victims, which was not deemed sufficient by the court. One of the two victims "was aware of what she was doing, whilst also pointing out that her ability to resist was diminished by her precarious circumstances, this fact alone does not necessarily constitute evidence of an intention to coerce" (page 39). The offender was thus acquitted for rape, due to the absence of proof of lack of consent.

Conversely, "the concept of exploitation is not, in itself, incompatible with the consent of the person being exploited" (page 31). Therefore, to convict for human trafficking, the court analysed, in detail, the conditions preceding the sexual relationships: the offender proactively contacted the victim, grooming her into deception, isolated her both socially and financially, controlling her behaviour, using threats and violence, imposing on her sexual acts with other persons and forcing her to carry out domestic work, retaining her passport, hiding her from the police, and so on. Those elements are traditionally proven in human-trafficking convictions and recognized as indicators of exploitation.

The inadequacy of the loverboy terminology

Although the three Belgian cases share several features commonly associated with the loverboy paradigm, the terminology proves insufficient to capture the full range of coercive intimate dynamics at play. Certain elements do reflect patterns described in the literature. All three cases reveal early-stage emotional manipulation, followed by escalating control, mirroring the coercive relational strategies typically attributed to loverboys (MYRIA). The 2022 Antwerp case illustrates the use of sexual acts, including rape, to test obedience and reinforce dominance, while the 2019 Antwerp judgment includes the filming of sexual acts as a tool of blackmail. Violence was also used as punishment for perceived disobedience, such as failing to notify appointments. The 2022 Liège case aligns even more closely with established loverboy narratives, particularly through online recruitment, the rapid formation of an intimate bond, and the strategic use of marriage to prepare the victim for subsequent exploitation. The

defendants' criminal histories, including prior convictions for pimping or involvement in drug offences in the 2022 Liège case, further echo traits described in the loverboy literature.

Yet, despite these resonances, the loverboy terminology does not adequately reflect the full complexity of the Belgian cases. Most significantly, all victims were adults, which departs from the dominant framing of loverboys as targeting minors or very young women (Bovenkerk & van San 2011). Nonetheless, the courts persisted in describing them as "girls" (eg Antwerp 2019: pages 14-16; Antwerp 2022: page 43; Liège 2022: page 32), illustrating an infantilizing discourse that operates independently of age (Chuang 2014; Doezema 2010) and obscures the structural vulnerabilities that shaped their involvement. These vulnerabilities, including homelessness, precarious administrative status, and financial insecurity, explain more convincingly than age why certain individuals were targeted. The 2022 Antwerp case also deepens the critique advanced by Katona (2017), who examined how sex workers may form intimate or dependency-based relationships with pimps or clients. In this case, the isolation of the sector facilitated a shift from client to trafficker, illustrating how blurred relational boundaries can mask exploitation until coercion becomes entrenched.

A further divergence concerns the role of non-monogamy. The MYRIA report on loverboys notes that violence may be tolerated within such relationships, yet infidelity is generally rejected by victims (MYRIA 2015: 29). Conversely, the cases analysed here rely heavily on multiple simultaneous relationships, presented as legitimate relationship structures ranging from "polygamy" (Antwerp 2019: page 13; Antwerp 2022: page 28) to informal "communes" (Antwerp 2019: page 13) to parallel marriages (Antwerp 2019; Liège 2022). Apart from the 2022 Antwerp case, where the existence of multiple partners was concealed, non-monogamy was explicitly invoked as a defining, and supposedly consensual, element of the relationships. Such narratives contrast sharply with the loverboy model and reveal that the terminology cannot fully account for the instrumentalization of non-monogamy as a defence strategy or as a means of normalizing coercive arrangements.

Finally, by centring deception, emotional attachment, and romantic manipulation, the loverboy framework, as explained in section [C], tends to disconnect intimacy from the other dimensions through which exploitation is exercised. This focus risks reproducing a siloed reading of coercion, in which the relationship is conceptualized as the gateway to exploitation, while the subsequent or overlapping economic, sexual,

and domestic arrangements are analysed separately under different legal categories. As the Belgian cases illustrate, intimate relationships constitute one of the sites through which labour is organized, discipline is enforced, and control over housing, income, mobility, and sexual availability is exercised. By isolating the "romantic" dimension, the loverboy terminology obscures how sex, intimacy, and labour are entangled in practice. Nevertheless, the case law demonstrates a judicial distinction between sexual exploitation and rape. Even within ongoing exploitative contexts, courts acquitted defendants of rape unless additional evidence established a clear absence of consent. The mere existence of sexual exploitation did not automatically nullify the possibility of consent to sexual acts. This separation of legal categories highlights the limitations of applying a concept that assumes a unified pattern of coercive sexuality when judicial reasoning treats different forms of offences as analytically distinct.

Taken together, these divergences show that the loverboy terminology is too narrow and too reliant on stereotypical profiles (Bovenkerk & van San 2011; Merodio & Ors 2020). Such a concept does not allow for the capture of the nuances of coercion, relational dependency, and strategic use of intimacy observed in these cases. It fails to engage with the role of non-monogamy, the diversity of victim profiles, and the ways in which coercion can be embedded in relationship structures that fall outside the dominant loverboy narrative. As a result, the terminology is inadequate for understanding how coercion operates across different intimacy settings, a dimension still largely underexamined in judicial practice.

In the next section, we will examine a body of literature on various forms of intimate relationships—queer, BDSM, "rough sex", and non-monogamy—to further contextualize the discussion on consent and coercion in this field of knowledge. This corpus of literature is for now disconnected from the anti-trafficking field. Yet, we argue that it would provide a more comprehensive, therefore more suitable, framework than the concept of loverboy for assessing these sexual-trafficking cases where the narrative of non-monogamy is evoked. Such an analytical lens supports a broader understanding of how relational vocabularies can be used to justify, minimize, or render invisible forms of sexual violence and exploitation, and the role of consent in these settings.

[D] FROM LOVERBOYS TO COERCION ACROSS DIFFERENT INTIMACY SETTINGS

Queer and non-monogamous relationships are not isolated from violence. Critically, the language associated with these relationship forms can be mobilized to obscure coercion, as illustrated by the cases discussed above. In these judgments, invocations of consensual love or non-exclusive relationships operated as strategic narratives aimed at reframing exploitative dynamics as consensual intimacy. Comparable litigation strategies have been identified in other queer contexts, particularly using the "rough sex" or BDSM defence in prosecutions for sexual assault, as explained below.

Navigating the taxonomy: terminology as a tool of legitimation

As the Belgian cases illustrate, the ability to name a relationship is itself a form of power, which might or might not include forms of abuse or exploitation. Scholarship on consensual non-monogamy (CNM) stresses that not all non-exclusive arrangements are equivalent, and that the distinction between consensual and non-consensual non-monogamy is fundamental: for many people, polyamory functions as an umbrella term for all "ethical forms of non-monogamy" (Lano & Parry 1995), endorsing the values of shared knowledge, commitment, integrity and consent (Emens 2004). Large-scale empirical work by Bente Træen and Frode Thuen (2022) demonstrates that CNM is both relatively rare and qualitatively distinct from non-consensual extradyadic relationships, particularly in terms of communication, mutuality, and perceived intimacy. They underscore that the mere presence of multiple partners cannot be treated as evidence of consent or relational legitimacy.

Meg-John Barker and Darren Langdridge (2012) provide an essential taxonomy of "non-monogamies" that helps decode these strategies. They distinguish between "polyamory" (often focused on multiple long-term, emotional bonds), "swinging" (couple-centric sexual sharing), and "open relationships" (an umbrella term for non-exclusive relationships). However, they highlight that these terms are fluid and often "borrowed" to perform particular identities or moral positions. In the Belgian trafficking cases, defendants strategically use these terminologies in the hope of avoiding conviction by demonstrating consent. For instance, in the 2019 Antwerp case, defendants invoked "polygamy" to suggest a communal relationship structure (page 13), while in the 2022 Liège case, multiple

simultaneous relationships were framed as marriages. Defendants adopted these relational vocabularies to shift their conduct away from the legal category of exploitation and violence, and toward the socially and legally more ambiguous terrain of CNM. This strategic relabelling mirrors what CNM scholars describe as the performative use of terminology to claim ethical legitimacy without demonstrating the practices that would substantiate it. CNM scholars rather focus on relational practices to categorize relationships, which parallels the analysis of judges in the selected cases: under the human-trafficking offence, consent cannot be strategically performed, as coercive contextual elements rather point towards a situation of exploitation.

Power and the illusion of ethical structure

CNM scholarship further cautions against equating relational form with ethical substance. Christian Klesse's (2006) work on "responsible non-monogamy" highlights how polyamory is often framed as an ethical alternative to monogamy through ideals of honesty, care, and long-term emotional responsibility. This distinguishes polyamory from stigmatized, "sex-centred" forms of non-monogamy like "promiscuity" or "swinging". However, as Jin Haritaworn and colleagues argue (2006), this ethical discourse can produce an "evasion of power", obscuring the structural inequalities—such as race, class, gender, and migration status—that shape who is actually able to consent, negotiate boundaries, or exit relationships.

This critique is directly relevant to exploitation contexts. In the Belgian cases, defendants' invocation of polygamy or communal living effectively appropriated the moral language of "ethical" non-monogamy to present a coercive environment as a legitimate, free, lifestyle choice. The defendants' invocation of "polygamy" or "communes" effectively borrows this "responsible" vocabulary to rebrand a coercive environment as a valid, "ethical" lifestyle choice, thereby masking the underlying exploitation. Structural inequalities are put forth by the selected judgments in the analysis of the individual situations of the victims, contributing to the definition of a situation of exploitation, the offenders abuse taking advantage of such vulnerabilities (Sciurba 2019). In the 2019 Antwerp decision, victims were foreign nationals in highly precarious or illegal administrative circumstances with no financial autonomy, creating fertile grounds for emotional dependency, leading to their sexual exploitation. In the 2022 Antwerp decision, offenders equally targeted women facing structural inequalities, due to homelessness, debt and

other forms of wealth asymmetries. In both cases, maternal relationships were instrumentalized by reinforcing paternal power over children through financial means, justifying income confiscation, or legal risks, by threatening the loss of custody in the Antwerp 2022 decision. In the 2022 Liège decision, offenders similarly leveraged migration status of the victims and their fear of deportation, as well as their language barriers, to reinforce coercive and exploitative relationships.

Empirical CNM research further demonstrates that relational choice is inseparable from material conditions. Terri Conley and Jennifer Piemonte (2021) show that relational satisfaction in CNM contexts depends less on the form of non-monogamy than on factors such as communication, symmetry, and autonomy. These findings undermine any assumption that an "open relationship" label is itself indicative of voluntariness or well-being. Similarly, Klesse's (2014) analysis of the political economy of polyamory highlights that many forms of CNM presuppose economic stability, housing security, and access to social capital—in a way polyamory is often a "privileged" practice, requiring economic capital to manage multiple households or the time for extensive emotional labour. Elisabeth Sheff and Corrie Hammers (2011) further show how race, class, and education structure whose non-normative intimacies are recognized as legitimate and whose are pathologized or criminalized.

This insight is particularly salient in the selected cases, where offenders systematically target individuals in precarious socio-economic positions. When shelter, money, or legal status are offered within the framework of an "open" (Antwerp 2022: page 25) or "polygamous" (Antwerp 2019: page 13) relationship, the appearance of relational choice masks conditions of survival-based compliance. When a defendant "rushes to the aid" of a homeless woman by offering shelter within an "open relationship", the possibility of refusal is materially constrained. CNM scholarship thus supports a shift away from formal notions of consent toward an analysis of constraint, dependency, and the material production of acquiescence (Haritaworn & Ors 2006; Klesse 2014; Conley & Piemonte 2021). As the body of literature above suggests, the "evasion of power" embedded in such narratives allows traffickers to recast economic dependency as romantic or lifestyle-based "sharing".

From non-monogamy to kink: the normalization of harm

The instrumentalization of non-normative sexual vocabularies in the Belgian cases parallels developments in sexual assault jurisprudence, particularly the rise of the "rough sex" or BDSM defence. In the 2022 Antwerp case, the court even refers to "hard sex" (page 43) and, in the 2022 Liège case, to group sex ("threesomes", page 32).

References to "kink", "libido", or sexual experimentation function to situate forced sexual acts within a supposedly permissive sexual subculture, as explained in the "rough sex" scholarship presented below. Elizabeth Sheehy and colleagues (2023) show how this defence relies on the claim that women "enjoy" or "ask for" violence as part of sexual play, inviting courts to infer consent to acts causing bodily harm and overstepping sexual self-determination. They argue that this narrative effectively resurrects the "she asked for it" myth under a subcultural guise. Criticisms of the "rough sex" defence have multiplied, originating from states such as the United Kingdom, Australia, or New Zealand (Gallagher & Ors 2022). The literature has shown, since the end of the 1990s, how defendants justify sexual assault as "rough sex" or "sadomasochist interests", understandings sometimes shared by the police, perceiving "normal example male sexuality as inherently aggressive" (Honkatukia 2001: 26). In some cases, these defences are used to justify practices such as choking, leading to the murdering of women (Edwards 2020; Gavey 2024), or leaving improperly addressed situations of domestic violence (Bradley 2022). This scholarship warns and criticizes that by treating non-normative settings as inherently more "permissive" regarding violence, the law risks normalizing a level of harm that would be unequivocally recognized as coercion in a monogamous, heteronormative context. The criminal justice system is further reinforcing the mainstreaming of certain practices, minimizing violence against women, as "everyday kink" (Gavey 2024) or just a "sex game gone wrong" (Fanghanel 2022). The proof of consent by the criminal justice system is particularly criticized in such cases: it may lead to binary categories and expected narratives, invisibilizing the experiences of affected persons and the difference between consenting or being coerced (Snow 2022).

Earlier scholarship similarly warned that consent discourse can be selectively mobilized to legitimize coercion, particularly where power asymmetries are ignored. Hadar Aviram and Gwendolyn Leachman (2015) showed how legal mobilization for recognition—most notably through marriage—tends to reinforce hierarchies between "legitimate"

and "illegitimate" intimacy. This dynamic is visible in the differential treatment of women framed as "wives" *versus* those recognized as victims, suggesting a potential judicial bias toward domestic stability as a proxy for consent. In the 2022 Liège decision, the first wife of the defendant is prosecuted herself for human trafficking due to her enforcing coercion on the victim, including through threesomes, while the judgment limitedly consider her own (restricted) agency in participating in such acts in the midst of an exploitative situation (page 36). Similarly, Emma Turley (2024) observes that BDSM communities have increasingly sought legal and social recognition through processes of normalization that privilege "safe" and "respectable" practitioners while marginalizing those who do not conform to dominant norms. Legal recognition, she argues, often comes at the cost of depoliticizing power and harm. Differently, an equal contribution to a marriage may, rather than the marriage itself, exclude the existence of exploitation. In the 2019 Antwerp decision, the wife of the third defendant is not handing over any of her income from sex work to the defendants and she shares family expenses with her husband: therefore, exploitation is not proven (page 20). This shows again that the Belgian criminal justice system rather refers to empirical (physical or financial) coercion than deriving consent or exploitation merely from marital status or relationships labels.

Polyamorous or non-monogamous and non-normative families already experience heightened scrutiny and regulation in legal settings. For the anti-trafficking field, the challenge is therefore twofold: to identify coercion embedded in intimate relationships without reproducing racialized, neo-colonial, or moralizing assumptions that render all non-normative or migrant intimacy suspect unless it performs a specific version of "respectability" (Doezema 1998; Kempadoo & Shih 2022). In the selected cases, consent plays little role, as it is irrelevant to the definition of human trafficking. Consent is deemed irrelevant (Article 2.4 of the Anti-Trafficking Directive), whether with regard to the exercise of sex work itself or its conditions, sexual relations with third parties or with the offenders, the type of sexual relations (even if it is "hard sex" or "threesomes"), and the type of intimate relationships (even if they are non-monogamous). Instead, courts focus on diverse forms of coercion exacted against the victims, and the control of their life, especially preceding or overlapping with sexual acts, to qualify sexual exploitation. While consent is important in sexual and work (including sex work) relationships, consent alone is insufficient to address the legality of labour and sexual relations (Niezna 2024).

[E] CONCLUSION—TO CONSENT OR NOT TO CONSENT: BETWEEN RELEVANCE AND INSTRUMENTALIZATION

By examining sexual exploitation occurring within non-monogamous settings, this article has highlighted how the narrative of consent is deployed in human-trafficking cases and how it can both mask and illuminate coercive dynamics. Although consent plays no role in the legal qualification of human trafficking, it remains central to other offences frequently intertwined with exploitation, including sexual assault and, more recently, forced marriage,[2] now expressly recognized as a form of exploitation.[3] The irrelevance of consent seems to allow better recognition of coercion, particularly where the criminal justice system relies on narrow, declarative understandings of consent leading to the minimization of violence. As shown vividly in the 2022 Liège case, the victims' statements were deemed insufficient to establish lack of consent during forced threesomes, leading to an acquittal for rape.

Such evidentiary constraints risk reinforcing judicial stereotypes about which forms of intimacy are criminal. These include racialized or neo-colonial assumptions about non-normative sexual practices, which may produce harsher penalties or, conversely, may impede the recognition of coercion in minority or marginalized communities. These tensions are not new. The European Court of Human Rights has long acknowledged the need to balance respect for private life with the prevention of coercion, including in BDSM practices (*Laskey, Jaggard and Brown v the United Kingdom* 1997; *KA and AD v Belgium* 2005) and has emphasized that the assessment of consent must take contextual factors into account, especially in these intimate practices (*EA and Association Européenne Contre Les Violences Faites Aux Femmes Au Travail v France* 2025).

The Belgian cases discussed here illustrate how non-monogamous arrangements can be similarly instrumentalized. Defendants strategically invoked narratives of "ethical" non-monogamous intimate structures to normalize violence or avoid liability, demonstrating how relational vocabularies can be deployed to obscure coercion. Although coercive intimate relationships have traditionally been theorized through the

[2] Defined at Article 4 of Directive 2024/1385/EU of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence.

[3] Directive 2024/1712/EU of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

loverboy concept, that framework remains limited by its narrow focus on stereotypical profiles of young, vulnerable girls and youthful male offenders. It also tends to obscure the wider spectrum of exploitation, including labour and sexual exploitation occurring within adult relationships. The 2019 Antwerp case hints at previous loverboy exploitation yet provides no detail and no prosecution of the original offender. In the 2022 Liège case, the defendant's conduct closely aligns with the *modus operandi* described in the loverboy literature, although the situation did not culminate in prostitution. These cases underscore the analytical weaknesses of the loverboy concept, which simultaneously conceals coercive intimate dynamics and the exploitative working conditions that emerge from them.

Insights from the "rough sex" scholarship help clarify these dynamics. Alexandra Fanghanel argues that "de-exceptionalizing" of sex is necessary to understand crimes involving sexual elements more clearly (Fanghanel 2026: 135) and warns that the concept of consent risks becoming a "black hole" when stripped of context. A narrow or formalistic approach enables what she terms the "weaponization" of consent, where the complexity of the circumstances under which a person might agree to a sexual act is erased (Fanghanel 2026: 67-73). In the Belgian trafficking cases, the opposite dynamic emerges. By treating consent as legally irrelevant, courts silo intimate relationships from the subsequent or overlapping exploitation and focus almost exclusively on the coercive process and working conditions. However, this separation risks obscuring how sex, intimacy, and labour intersect, particularly in contexts where the roles of intimate partner, client, and pimp may overlap.

Taken together, this article has demonstrated how analysis drawing on queer and kink scholarship can enhance a more contextual analysis of coercion embedded in intimate settings. Moving beyond loverboy stereotypes requires attention to how relational labels can disguise coercive practices and create an illusion of ethical intimacy, particularly when boundaries between "work" and "private life" are blurred. Ultimately, the 2022 Liège judgment suggests an emerging trajectory in which complex forms of sexual violence may be prosecuted as human trafficking, expanding the scope of the exploitation concept beyond the traditional category of exploitation of prostitution, and alternatively to offences such as rape or sexual assault. Such an approach may provide a means for recognizing violations of human dignity in diverse relational contexts, including non-monogamous settings, group sexual practices, or situations involving individuals with experience in the sex industry. This development calls for careful reflection, ensuring that the law can identify

coercion without pathologizing non-normative forms of intimacy, while remaining attentive to the structural dynamics that shape the possibility of consent in the first place.

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Special Section: Celebrating Carrie Menkel-Meadow … The Researcher, the Lawyer, the Woman, the Brilliant Friend!, edited by Maria Federica Moscati, pages 151-346

Introduction: Talking to Carrie …

Carrie Menkel-Meadow
University of California, Irvine

Maria Federica Moscati
University of Sussex

This Special Section is dedicated to Carrie Menkel-Meadow (hereinafter, Carrie) , expert of dispute resolution, mediator, feminist, lawyer, teacher, mentor, sociologist, dancer, Pygmalion, and above all a brilliant friend!

When the idea of a Special Section came up, we envisaged it more as a gathering of human beings sharing the same values, talking to each other, rather than the usual academic special issue. Thus, those who contributed to the Special Section are Carrie's former students, colleagues, friends who, in their writing here, have shown their appreciation by engaging with her work, but also by sharing personal memories (including pictures) of their relationship with Carrie. In an era dominated by artificial intelligence (AI), we decided to let our positive emotions, relationships, ideas, and personal anecdotes speak about and show the transformative impact of Carrie's work on all of us, not only as teachers and researchers, but also as individuals.

As dialogue and direct communication are essential in Carrie's work, and similarly important is a feminist call for relational ways to share knowledge (Menkel-Meadow 2027 forthcoming; b hooks 1994), this celebration opens with an interview between Maria Federica Moscati (hereinafter Marica) and Carrie.[1]

Marica

Hello, Carrie. As I said last time, when I read all the papers for this Special Section dedicated to you, I visualized a big table, at dinner or at lunch, maybe in Italy with you, all of us and a lot of talking, laughs, love

[1] The conversation was recorded on Teams.

and so on. So, what you have created, Carrie is beyond academia. What comes out from the papers are the connections, the relations that you have beautifully created. A first question I have is: how do you apply what you have beautifully written on dispute resolution in your daily life?

Carrie

The most interesting part really is that my best student, unfortunately for me, is Roberto, my husband. Every time I try to have any kind of argument or disagreement, he says: are we looking at the underlying needs and interests and what can we possibly do to solve this problem?

So, I get it reflected back to me in my personal life, I would say, even more than in my current professional life. I mean, obviously, I used it as a mediator all of my career (over 40 years as a mediator) in trying to solve other people's problems. And I was for many years a strategic facilitator for law schools, so, I went into other law schools and facilitated dialogues. But, I would say that my current law school is very problematic, and I have not been able to use a lot of my writing and ideas there at all. In the current political climate, everyone is afraid to speak about anything controversial—that's very difficult for a mediator, teacher and facilitator!

However, two of my dear colleagues from Israel—you have them in this issue (pages 000-000)—Faina Milman-Sivan and Dana Feinreich-Giloh wrote an incredible article that has just been published in the *Journal of Legal Education* in the United States (2026). They created a conflict resolution clinic inside the University of Haifa after the Gaza war started because they were demonstrating how conflict resolution could work, even in very difficult circumstances. Haifa is the most integrated of the Israeli universities. They had a lot of Arab Israelis and there were protests and the university was going to discipline them. There have been several things in the last few years that have just been very touching to me, like this example: Faina and her colleague, Dana, wrote this article about how they took my ideas from when I taught at Haifa in 2007 and 2008. I've taught there several times, and I taught conflict resolution and mediation. They created a clinic for the law students to use ADR and mediation to resolve issues of freedom of speech and university discipline, which is an absolutely terrific model.

It was very moving to me because—as I wrote in the piece that I did for Naomi Creutzfeldt (Creutzfeldt & Ors forthcoming)—after I had a pretty good semester of teaching international dispute resolution, after the war, after the Gaza–Israeli War, I had a good experience in my own class at UC Irvine (UCI). There was a small seminar group, one Israeli-born

student and a couple of Arab–American students. And we just developed this enormous amount of trust. And the class was great. As a result of that class, I was invited to speak at a conference in the political science department at UCI about how I did that. And, as I started to talk, a very left, pro-Palestinian faculty member and a whole bunch of graduate students shouted me down and said: "You're complicit with the war if you're talking about this issue this way" [trying to have a conversation about it]. UCI was not a good model of good discussions in many places, including the law school at the present moment.

So I just need to tell you that I have tried every time I can to use what I write about in my classes, in my personal life, and in consulting for organizations, but it is not always possible. And so the Faina and Dana piece about Haifa University was just so moving to me because there they were in the war zone and they were more able to create a culture of the students trying to engage practically with conflict resolution than my own school [University of California], which claims to be a big proponent of open free speech. [The UC Berkeley Free-Speech movement in the early 1960s jump-started much of the student protest movements in the US—so a bit ironic now.]

So, I continue to do it in my own classes. But the key here is, as you said at the beginning, to establish trust and caring. And, I think, when students are in my class, they get that sense from me. And so, some of the students in my class said things in the class that they probably would not have done outside of the classroom because, after the Gaza War, the campuses were totally politicized. And so, as much as I would offer to facilitate dialogues about important things, most of the students weren't interested. So, to answer your question, I try in my own classes to create a safe place for problem solving and mediative approaches to things and to see, not just extremes, but that there are always other solutions. And, for the most part, I've been successful, but not at my own institution at the moment. It's a very polarized time in the United States, generally for politics, but after the Israel–Gaza war started, it was very bad.

I was a visiting scholar at Oxford during October 7th, and it was pretty bad there too. I mean, I actually asked if I could facilitate a dialogue with the graduate students in the socio-legal programme because I became very close friends with two PhD students or DPhil students—one was Iraqi growing up in Germany who became a British solicitor; and the other was Lebanese, grew up in the Netherlands. And we were three women and we had the most amazing relationship, all of us first generation from wherever we came from (me the daughter of Holocaust refugees in the US)

and they were trying to become academics, very progressive. And they were both from the Middle East. And they're much, much younger than I am. But across this generational thing, we've created this wonderful dialogue of gender and how we hoped to create peace in the world. And I said to the Director of the programme, we have a very good group of graduate students to have this discussion with, but that was ultimately discouraged. Some people thought it was too divisive and there was too much hostility going on in Oxford, which I later saw. The Oxford webpage kept shifting from, after October 7th, we condemn the killing and all the dead Israelis. And then over time while I was there, it got more and more pro-Palestinian (so did the BBC, where I had made friends with a former Middle East journalist, where we could discuss these issues in private). One of my colleagues also visiting at Oxford (not from UK, US, Israel or the Middle East, but from another place) actually filed formal complaints with the BBC about her perception of changed and more "biased" coverage. And so, it's a long way of saying that, whenever there are big issues in the world, I still try to use some of what I've written about, and it's gotten much harder, is what I would say. It's just become more difficult.

Marica

Thank you. You said it was a divisive issue, what you wanted to do, but isn't it at the core of the dispute resolution discourse and the work that we do, as teachers and researchers in dispute resolution, just to deal with things that are problematic, that create divisions, but then our aim is to build up trust? So, how will this trust be created now, how will it be kept in an era of AI, in a moment in which we don't trust each other anymore, and we doubt everyone?

Carrie

That's a huge question. In the paper I just did for Naomi's book, I said there were two problems for legal education (Creutzfeldt forthcoming). One was this: the curtailing of speech. Because both the left and the right in the United States are policing speech and nobody feels safe saying anything in this cancel culture. And the other is AI. I end my paper by saying I still believe in humanistic intelligence. I'm on the AI committee at our law school and I am the Luddite. If you read it, I wrote that at the end of that paper. Currently, the more elite universities in the United States, in law and humanities (for instance, Columbia University) are beginning to say "no electronics in the classroom", nothing. No laptops, no smartphones. I don't know how they're going to police it. And the idea is—I said it more simply—that they still think that to begin education you must use your

human brain, and you must be able to engage in critical reading of great literature. When I went to Columbia, only the men at Columbia University could take those two courses. I was at Barnard, the women's school, but I went and audited them. I sat in the back of the room, and one course is Contemporary Civilization and the other is Western Civilization. So, one is the history of the world, and the other is the literature of the world. And in my day, they were all DWEMS (dead white European males). And later I was part of the movement, as a professor, to broaden the canon of what was read. Now there are some women, like Emily Dickinson, and some writers of colour, like James Baldwin, from Harlem and Paris, and Toni Morrison and others. So, they broadened the canon. And I found it really amazing that it was Columbia that said no electronics in the classroom and no electronics will be used for evaluation. And Berkeley Law School did the same thing. They're not allowing AI or electronics in the first-year law programme for class and for evaluations. I'm on the committee at my own school. We haven't gone that far because I'm probably the outlier. I'm the oldest person on the committee. I think that we should do a similar thing because at least at the beginning of learning to be a professional, learning a discipline, it has to be both things in the brain—critical and independent thinking, as well as learning what is already known, as in AI.

And empathy, as you said, I'm about love and getting to know other people. And you can't do that through machines. So, I don't want to make too much of it, but it's one of the reasons I'm retiring. I did not become a law professor to teach people how to use machines to solve problems.

And some of my younger colleagues, that's what they want to do. They think it's important for modern legal education to teach our students how to effectively use AI. They're creating assignments where they give students some AI document and say: correct it based on what you know. There are all kinds of interesting experiments, fine, that's for them. I started and I'm ending in a period in which people are important to me … I always say I'm a P2P person. You know, people to people, not business to business.

Although I did a lot of commercial mediation in my day, I came into this to help people to care for each other and to make the world better. It's a big challenge. And I'm glad I'll be able to see this little last piece of it because our committee is going to draft some policy by the end of the year. And I'll be around for that.

But I guess what I will advocate for us is that I still think the professor should decide and not the whole school. You know, because I still prohibit

the use of AI in my classes. Not that they're not using it. I know that … I caught three students that turned in AI papers last term. So, yes, I think it's our big issue now—it's one that has many challenges—but that's one of the big ones right now.

Marica

That is one challenge for dispute resolution teachers. What do you think the other challenges that we, as dispute resolution teachers, are facing now?

Carrie

I would mention one challenge that both dispute resolution teachers and also dispute resolution practitioners are facing. I am friends with Colin Rule, who was the man who promoted and developed ODR in the United States and eBay and all that. And he's still pushing this—the use of online, computer/machine-assisted dispute resolution, and they all said during Covid that it was so great that Zoom, and I guess Microsoft Teams now, also have breakout rooms, right? So that you could do a lot of this work in separate rooms online. But, in my own experience—I've been mediating for 40 years—it's just not the same thing as people being in the room together. It not only affects teachers who have to deal with this: what are you teaching the students to do? To manage breakout rooms or to facilitate real communication between and among human beings? Are you teaching them to be online, or are you teaching them how to bring people together and try to solve their own problems in person?

And I do love Colin, but he's not a lawyer and I still think that matters for dispute resolution too—knowing the legal issues, as well as managing the solutions and the people. And I say that as someone who did a lot of corporate big business mediations too: those are also about relationships as well as legal issues.

And so, it's a challenge for those of us who are teaching. What are we teaching? Are we teaching the skills of facilitation and helping people communicate with each other? And having new legal ideas that don't exist yet? I mean, the trouble is—I say this a lot now—my big thing is: *AI doesn't know how to "think out of the bot"*.

I teach students how to think *out-of-the-box*. I do that little exercise with connecting the three rows of three dots with one continuous line —you need to think out of the box for that (Menkel-Meadow 2022: 25), but my latest line is, I don't want to teach people who don't know how to "think out of the bot". And that's why I say to Colin and the pro-AI people, data

mining is great for showing what all the settlements are and what like cases are like. But, if you're trying to create a specific, tailored solution for people, AI is not there yet. It might get there. Who knows? But it's not there yet. And it doesn't teach creativity. It really doesn't. And, the main thing is that it can't jump categories. So that's a challenge. That's one challenge.

And, I guess another interesting thing I would just say is that I noticed, just looking around, that we're back into a period where there's some hiring going on in the law schools in the United States. You know, there was a big collapse of hiring in law schools during Covid, but now, all of a sudden, every school's got two or three openings. And there was a very interesting statistic that was posted last week by Art Hinshaw on our ADR listserv. Only five per cent of openings in the United States for law professors even mention dispute resolution. Five per cent. I mean, that's tiny. And, when people come to me and say I'd like to do what you do, how do I get this job? I say, I wasn't hired in any of my jobs because I was only a dispute resolution person. I got hired because I taught civil procedure and because I taught legal ethics and professional responsibility. And employment law and also international law, later … Many things not just dispute resolution. And because I was a founder of clinical education, my first job was to do clinical education at the University of Pennsylvania. So, in the United States, there are probably only four or five schools that are so specialized that they would actually look for somebody in this field of ADR. So, the challenge is, in my view, and for everyone in our field … dispute resolution should be a mandatory subject for any lawyer. I mean, most of our students are never going to go to trial. Only two per cent of filed cases in the United States in the federal system go to court. And that's probably true for state courts too. So, when we teach mediation, negotiation and problem solving, they are the most important skills that lawyers can have.

And when students take my classes, they all say: this should be required, everybody should take it. But UC Irvine has the smallest programme in this of any of the schools I've taught at—UCLA, Georgetown, Harvard, Stanford etc. At Georgetown, when I was there, we built a much bigger programme with lots of people, both academics and practitioners teaching courses.

One challenge is that we think this is an important field, but, for whatever reasons, it's not a point of emphasis for teaching, and even for scholarship too. I could tell you, because I recommend them all the time, the top five intellectual dispute resolution people who are working on ideas in the

field. There are a lot of people teaching at the skill level, but what I worry about, a challenge for me, is how do we move the field forward and have new ideas? And there are only about four or five people that I read who I think are pushing the boundaries and getting us to think of new ideas—more outside of the United States—you, Naomi, Orna [Rabinovich-Einy], Nicolas [Parra-Herrera], those we invited to this symposium and others outside of the United States or outside of law schools … Some good work coming from business schools—Remi Smolinski (2025)—or diplomacy studies—Emmanuel Vivet (2019). Otherwise, everybody's just teaching the same old stuff. And it's not like there aren't intellectual critiques of *Getting to Yes* or problem solving—there are problems to be studied in our field!

An article was published in 2017 by two business professors at Wharton Business school at the University of Pennsylvania—Jennie Huang and Corinne Low (2017)—which is where Trump went to school. That's the business school at Penn, and Bob Meadow went there too. And they are business school professors, and they had been running simulations of students negotiating in the business school for years. And they wound up having what was a natural experiment, which they didn't plan. The students were doing simulations, and the professors were looking at gender effects. So, they had woman, woman, man, man and women–men teams of negotiators. I don't think they were doing non-binary stuff yet, but whatever. And they had them matched up. And they found that after the election, after the 2016 election, it was amazing! That the men in these simulations in class were getting more aggressive toward women. And, so the article I've cited it, if you'll find it, it's in the thing I wrote for Naomi's book. I put it in everything I write now. It's called "Trumping Norms" (Huang & Low 2017). And the question they asked was, how has the larger political culture affected everyday behaviour? Everything that I worked for for 40 years is being challenged. So, that's a really big challenge for the field, substantively, like intellectually, how do we fight it? And then how do we teach about it? What can change whole negotiation and dispute resolution cultures? Outside particular disputes or disciplines—the larger political culture or zeitgeist?

Marica

And also, as we said in our conversation a couple of weeks ago, there is the impact of climate change on how we react and how we perceive the wrongs. But you just said the word "creativity" which brings me to ask you a question about another part of your life: you and the arts.

Not only as a dancer, because you are a ballerina, but also you are actively supporting arts. And I don't think that the general public, the general readers of Carrie Menkel-Meadow in dispute resolution, know about what you and Bob are doing for theatre.

Carrie

Yeah. Oh, great. I love that. It's my new life. You know, I love, I have loved, my life as a law professor and a scholar. But this was really interesting. We've been supporting some smaller theatres in Los Angeles, just as theatre goers and small donors, for years. But I had a friend, a good friend at UCLA (Stella Ong) and her brother—they're Singaporean—Henry Ong who was a playwright. He died of cancer a few years ago. And we went to all of his plays. And his plays always took some theme from Asia. His first play was about Madame Mao. And then he wrote about Dr Noor, who was involved in the Killing Fields in Cambodia. He would take some figure in some part of Asia and wrap a whole play around it. Just about a little less than 10 years ago, I was literally in Singapore giving a big speech about mediation when my friend Stella called me and said Henry was doing a reading of a new play. So, Bob and I went and it was called *Ascent*, A-S-C-E-N-T, and it was about a Chinese physicist who went to the United States in the 1930s to study at MIT and then Caltech, and actually became one of the founders of, here in the United States, the Jet Propulsion Lab, which was the science behind rockets.

It was literally rocket science. And it was an amazing story. His family had been pro-nationalist China, not Maoist. And he became a very distinguished scholar and physicist and scientist, helped the US during World War II, got all these honours. And then, when the Red Scare of the 1950s happened, he was deported back to China.

So that in itself would have been an interesting play. But what then happened was, Mao is no dummy and he saw how much this man knew. So, Qian Xuesen, my Chinese isn't so good, Michael [Palmer] would correct it. You can ask Michael if he knows about this story … So, Qian Xuesen then became the head of China's rocket programme. And the great irony of this play, all true, beautifully crafted by Henry, is that this man then developed a rocket that the Chinese gave to Iraq that was used against the United States in the war against Saddam Hussein. So, I'm a peacenik, right? What is that in all of this? And the play is amazing, and we've now produced it. It was on stage in Los Angeles in the spring. The last scene has Qian Xuesan up in the sky. Originally, in production, the plan was to have him literally ascend, ascend like a rocket, and he speaks from

heaven. And he says: "I'm looking down on the world, and I see China, United States, they're all very little and they're all using these things against each other." So, it just has this wonderful message, and of course so ironic and so timely now. The play was written over ten years ago!

And, so then, we were in the process of trying to raise funds to produce it. And then Henry got very sick and died. And then there was Covid. And then, when all the immigration and deportation stuff started happening in the US, we decided that it would be, especially, with all the anti-Asian discrimination during Covid times in California, so important to present now. So, we're very proud of it. We went back to the original director, a young woman (Diana Wyenn) who we're now very good friends with, who did the reading, and Stella, Henry's sister, who's his literary executor. And we're very proud of it. It won a lot of local awards. And we're in the process of trying to see if we can move it to other locations. But it ran in Los Angeles in a small theatre that was wonderfully called Skylight. This theatre was called Skylight and it literally had a skylight at the top. So, we couldn't quite do the rising from the stage, but there was this skylight and it was extraordinary.

In between all of that, in 2023, when I was visiting at Oxford, we walked down the street the first week and I saw that the Oxford Playhouse was doing the play version of the movie, *I, Daniel Blake*. And I had been a huge fan of the movie. I had been showing the movie in class because *I, Daniel Blake*, directed and written by Ken Loach, was about navigating the welfare system and benefit system in England. And an unemployed, injured white man helps a younger minority woman who's actually more attuned to computers than he is. And it's about navigating the welfare state which is going online and not being very human. So, I love the movie. And so, we go to the play and I, in the middle of the intermission, I said, we need to produce this in Los Angeles. And lucky for me—you met him—our friend Stephen Grosz, a human rights lawyer in the UK, was Ken Loach's lawyer. So that day I wrote, we were going to see them anyway, I wrote Stephen and I said, could you see if Ken Loach would be willing to let us produce this in Los Angeles? So that's really when I say that's how my career started, because ultimately these two other things got produced before *Ascent*. *Ascent* took a long time to happen.

But what was extraordinary was that we mounted *I, Daniel Blake* within one year of my seeing it in Oxford. It was complicated, but it turned out ok. And it was right up my alley as a former poverty lawyer. I mean, that was everything I've worked on my whole life. Ken Loach immediately said yes, but the play was not written from the film screenplay. The play was

written by the man who was the actor in the film (Dave Johns). And he said yes. But his agent said that he could do better than a small little theatre in Los Angeles. And she tried to sell it to people in New York, so it took some time for us to get the permission.

And then finally we got it. *I, Daniel Blake*, was played in a theatre that we have been going to for years, in the fall of 2024, one year after we came back. And then that same theatre [The Fountain], the artistic director of that theatre, who we've known for 30 years, is a playwright [Stephen Sachs]. And he put together a play called *Fatherland*, which didn't need any permissions. It was based on the trial transcripts and all public statements of a young man in Texas who turned in his father to the FBI when that father went to the US Capitol and charged the Capitol on January 6th, 2021 and was part of the riots. It was very dramatic. And so, we produced that one too and it went to New York and was featured on national TV as well. And now Bob and I have formed a little company. You'll appreciate this; the name is Polyhume = political humanism.

And our idea about that is that when now people are sending us scripts—because we're getting a little bit of a reputation in Los Angeles—we're not just producing anything. It has to have a humanistic, some humanistic message. And, so far, the things have also had some important politics in it. We've done five plays. I won't bore you with all of them, but we've done five plays and we're in process on three more. This is going to be my post-retirement plan.

Because, as you know, as a former dancer, I'm a little too round and short for it now, but I still do it privately. And, you know this, I read and I've actually been doing a little fiction writing myself as well. I've always believed the arts are where you really reach people. And, as you said in our talk, I've not forgotten this, the arts can educate, but they also bring joy. And law doesn't bring a whole lot of joy. I mean, even when you win, when you win a case, you're winning and you go, "Yay, I've just won!" But somebody on the other side, even if they're a bad guy and done something wrong, they have lost something. It's not joyful to beat people up and win all the time. So, with this depressed state of the world, it's so wonderful to be in another discipline.

And, as you said, through sponsoring and helping others, now we have all these friends that are much younger than us, and they're struggling actors and directors and creatives in Los Angeles. And that's a tough place to do it, like London and New York, but Los Angeles is dominated by the big studios and big money. So, we're working in small community-

driven theatres and we have to raise money, and we have to figure out who our audience is.

And so it's kind of interesting to do that kind of creative work in the shadow of a lot of … garbage that's on TV and in the movies. But it's, you're smiling and that's just it. It's been doing *Ascent*, this play was one of the most joyful experiences of our life. And we became friends with these young actors and the director that we have, Diana: she's a choreographer too, and she works in opera with music direction, and she just did a big programme with Yo-Yo Ma. And just to watch her, this young creative person, she's been a real model as well. I wish I'd seen her earlier. Because she's a director she has to tell people what to do. And she does it in such a kind way—Diana, thank you for showing me that. She would say: "Could we maybe just try it this way and see how it works?" Which is what we mediators do? You know, "What if?" And I'd say, as a feminist, I think it's a very female way of being a director. She's just encouraging other people to be creative in such a kind way.

And in all my years of giving feedback to students, I've always told people: you have to start with the positive because they're not going to hear you if you just start criticizing them. But Diana has just been a model. I wish I had encountered her even earlier in my career … but the nice thing is, you keep learning from people all the time.

Marica

That is a privilege. I was thinking the other day about new beginnings that arts can give us; every time I enter a dance studio, I think that is a new beginning, that I can learn something new, it is a privilege. But don't you think that bringing arts into our law teaching, not necessarily focusing on subjects, but the way in which arts are taught, the beauty, the joy, the resilience for mistakes that they provide, is something that, in this historical moment, can support our law teaching and, more than that, the law learning for our students?

Carrie

Oh, boy, absolutely! It couldn't be more right. I mean, what's so interesting now is that at least for my students, who are diverse and also somewhat diverse class-wise, but there's a lot of upper middle-class kids. And certainly those in First Gen and Second Gen, they won't miss anything; they don't want to make mistakes. You know, I have a lot of First Gen students whose parents want them to be lawyers because it's

a lot of money and prestige, and so they don't want to make mistakes in school. So, you're absolutely right. And the other thing I'd say is that I did Pilates and step classes and aerobics all of my life after it became clear that a short person with a big chest wasn't going to be a ballet dancer. I've learned how to teach from my dance teachers because they correct your posture, and you do many repetitions, and you do it again, and you fall, and you have to get up. And, in the beginning, when I first started teaching, law students were much more willing to take risks and be critiqued, but that's another issue we have now, that they're so afraid of making mistakes.

Let me tell you another part of my life, which is that, this is also in the piece briefly that I gave to Naomi. In 1978, I was part of a group called the Project for the Study and Application of Humanistic Psychology and Law. That's a lot of words. But I spent time in a place called Esalen on the West Coast of California in Big Sur. It's beautiful. Its methods were a little bit like Tavistock in England. A lot of Gestalt therapy and dance therapy, you'll appreciate this. So, I took a couple of workshops with an amazing dance teacher. And what you did was you started the class by making, even if you weren't an artist, by making a picture of your own body and what was hurting you. This is probably pretty common now, but this is 1978. It wasn't a lot and people would do their backs or their heart or whatever.

And then we had a movement class for about 45 minutes. No words, just movement: some taught, constructed poses, but then a lot of free-form movement. And then after the class was over, you drew your body again. And, of course, for many people, there was some relief, whether it was temporary or not. But I learned so much. This woman was named Janet Lederman. I wrote about her earlier in my career. And she brought the physical into all teaching and therapy. And so it was ironic because I actually did this stuff when I was teaching at Penn, which was a very traditional Ivy League school. And then I moved to UCLA and I thought, California, it all comes from California. And I did movement exercises in my law school classes. But people just got really freaked out that Janet had some amazing exercises to help people see differently and to interact physically. One of the things was—and she did a lot of corporate consulting—Janet worked for Stanford Medical School. And there was one of thing she did that I never forgot. When you go into an organization, you could do this in a mediation where there's a lot of conflict. She took people's words away and she would say "Make a sculpture of your organization." And, of course, typically they would put the dean or the department chair on a chair higher than everybody else. And she would

say, “Okay, so now you’ve done the organizational chart, now I want you to make a configuration of people as you see the power or you see who’s making decisions.” And then she would have little variations on that. And it was just very dramatic and honest in those days. And I have a lot of exercises like that. And it was amazing teaching. And so it came from using other modalities of teaching. And you do it, and I do it. And when I first came out of this programme, people thought it was weird, but they also thought it was creative. And I was able to do it even in very conservative places. And I can’t imagine doing some of this now at UC Irvine, because the students there are so professionally oriented. If it’s not immediately relevant to their being a lawyer, they would ask: why am I making a sculpture with people? What does that have to do with being a lawyer? Well, it’s teaching about relationships and I love doing that stuff. And, since you’ve got me talking about it, the interesting question is when I go back and teach negotiation in a few weeks, whether I will use any of my producer-of-plays stuff in the classroom.

Marica

I think that you should because you had to do a lot of negotiation. And to put up a show, the actors, the dancers have to negotiate with the space, with the stage, with the barre, between them.

Carrie

Right, the set and all the artistic issues and judgments. Lots there.

Marica

And I think that there is a common interest there because all the actors, all the dancers, they share the common interest that the show must be great. It’s important also because arts are about bodies and sometimes, when we teach, students don’t realize that actually the law is about bodies. I love dance and I think that dance can help law students to interpret the law with a bit of more empathy and teach how to listen actively—the active listening so important in negotiation.

Carrie

Right. So here’s another example. One of the best conferences I went to when I was affiliated with the Programme on Negotiation at Harvard was with Michael Wheeler, with whom I co-edited a book on ethics (Menkel-Meadow & Wheeler 2004). We did a conference one weekend on jazz and

improvisation and negotiation. You may know that we had a special issue of the *Negotiation Journal*. And I was just explaining that to Bob that, in improv, and this is true in dance, and it's certainly true in jazz, in jazz, someone does a riff with an instrument, and then you're supposed to carry it further. And, in improv, we used to go to improv things in Los Angeles. It's the offer, you know. There's a prompt and then the actors do something, and then they go "And?", and then the next actor is supposed to pick it up. And the big thing in improv is you can't say "*but*". You have to take the "*and*" and move the piece forward. You can't stop it. And so I used to talk about that with *Getting to Yes* and negotiation. You have to hear, we said, actively have to hear, what the other side is offering you. And adversarial lawyers will say: no, I can't do that. Absolutely not. But that won't work. And what we get from improv and jazz is that you have to be present, you have to listen, and you're trying to move the music or the acting piece forward. And, right after that conference, I think I used it much more explicitly than I have recently. I think I'm losing the trail. But it's coming back from *Ascent*—the play.

But something else I just wanted to add to what you said. You're right, in a production, everybody wants it to succeed, as you know, if you've ever been in any performance. When I was younger, I was the dancer; I was always in the chorus in the back in *Oklahoma!* and all these shows that we did in my high school. But after a play is over, people, when it works well, they have formed a family and connections. And it is teamwork because everybody is succeeding. And the other place where that is true is medicine, when it works well.

My brother is a physician. When I became a clinical teacher—this is an amazing story; I don't know if I ever wrote about this—Robert and I went to my brother's hospital in New York City. He gave us white coats, and we did a 48-hour shift of being on duty with him. One interesting thing was we had the same white coats as doctors. Now we'll probably get in trouble because I'm not sure he had any permission to do this. But we had these white coats that said Dr Meadow and Dr Menkel-Meadow on them. And, of course, people looked at Bob, my husband, and thought he was the doctor. And, even though I was wearing a doctor's white coat, people thought I was the nurse. But I did it as a clinical teacher. I wanted to watch my brother teaching medical students. And what was going on was what we in law school call the Socratic method. You know, the student would have to present the symptoms and all of that. And then my brother would say: what are the differentials? What are you going to test for? And there'd be a group of four to five residents and interns, not a class of 100 students, which we had in law, all being humiliated by having to answer

those questions. But what got me was that they were all working towards the same goal, to try to treat and cure and help the patient. And so, I would give talks to clinical teachers and I would say, for a lot of advocacy in clinical, you're teaching students how to beat the other side. And, in medicine, it's teamwork, as in theatre.

So, what are the professions, and social work too, in which people in teams are trying to work on the same goal together? That's quite different from what lawyers do. And, I mean, other than the mediators and people who are trying to solve people's problems, you are trying to make a team out of the disputants and everyone else who's there. But it's very hard. And teamwork is not the cornerstone of being a lawyer. It should be, but it's not.

And so these other disciplines can be very, very, very helpful. And there's all these medical shows now on TV that we're watching again: *The Pitt (HBO 2025-2026)* is amazing. And it's all about that. I mean, there's conflict within, but the group clearly has this purpose of trying to do a good thing. And, watch the law shows: they don't do that.

Marica

Okay, talking about the group, I would like now to talk about something else, about groups working together and related to conflict. And this is something that I recently learned about you. So, sport … football—soccer in the US! And, in particular, I know that we share the same passion for Messi and Maradona.

Carrie

I see him. Lionel Messi, who has retired from international play. Yes. So, yes, there were a whole bunch of little conflicts during the World Cup recently, as you know, including a friend of mine who is English, who knows I've spent a lot of time in England, who was outraged that I was rooting for the so-called "cheaters" in Argentina. I think he forgot that I've lived in Argentina a lot. I've lived in Buenos Aires. I've taught there six times. And my best friend in Los Angeles is Argentine. She was a law professor for many years, and she introduced me to football. And I actually was in Buenos Aires for several of the World Cups, not the one where they won. We were in the States. But it's interesting because I've always been a critic of sports because it's a metaphor for winning and beating. And there's so many metaphors in law, eg "take them to the mat". That's wrestling and boxing and all of that and clobber them … I mean, it's just terrible. And yet people say it's nationalism, pride, you know.

I grew up in New York City. In my street, when I was there, there were the Dodgers, who are now in Los Angeles, but for New York, Bob Meadow was a New York Yankees fan. I was a Brooklyn Dodgers fan. I mean, people got into huge conflicts over their loyalties for teams. So, loyalty to a sport can be very important for building group loyalty, solidarity and consciousness and being proud. I mean, Argentina has a big pride problem for a lot of reasons we don't need to go into here, but you know, it's an incredibly beautiful place. It has many wonderful resources. It's had a dictatorship, and Messi helped unite a people that had a lot of struggles and, for me, Messi is football. And I found it very annoying that my English colleague criticized me for supporting a team when, as I said to you, I find English soccer culture very annoying, shall we say, because when I've lived in England, the stampedes that happen in stadiums and how people behave when they're drunk … I will say this from observations: I have not seen Argentines behave like that, other than a big to-do after the victory was over and they turned their backs on Spain, which was not a good thing to do. But, in general, Argentines behave better inside the stadium than many of the Brits that I've seen watching soccer. And they certainly behave better than the way some Americans behave in football, you know, our ugly football, which is even worse because it's more violent. So, it's a conundrum. It's a paradox because I loved it. I loved it this summer to have something to care about outside of myself and my other countries that you too, we are both multi-country-ish, multicultural, as are so many of my friends … And I just loved the loyalty to Messi, but it showed the ugliness that also happens with over-identification. And I remain quite angry at my friend for how he behaved. You know, sore losing on his part to call the Argentines cheaters (after the English lost). I mean, in my view, whether it was cheating or not, to the extent that I know anything about soccer, I watch the calls by the referees and they're all over the map. Some of them are very strict and some of them aren't, so I'm not about blaming the players a lot. They're all, you know, they all get ugly out there when they trip each other up and all that stuff, but … It's a real problem for conflict resolution because it helps form a solidarity of a group, which can be important. And in my view, it tends to produce too much false loyalty and conflict, and referees, like mediators, are all over the map with their "calls".

Marica

Football triggers conflicts as well as joy.

Carrie

Right, exactly. So, I can just say to you, you can put this in the transcript. I've always said that my whole career can be summed up in one word, "*and*" … right? So, sports is joy and conflict, and they both exist at the same time. And everybody comments, especially journalists. They always have to have one explanation for something. And these things exist paradoxically together. You know, that's life.

Marica

Yes! Once I met a child who is a peer mediator and he decided to train as peer mediator so he could, quote, he could help people at the stadium when they watch the football match.

Carrie

That's amazing. Oh, that's amazing! That's a fabulous story. Some years ago, there was a very controversial art exhibition in New York that came to Los Angeles. It was called "The Black Male". And it was all representations of black men. And, you know, they had paintings and sculptures of artists and writers. And then they had like one room that was just full of basketball trainers because black men were on all the basketball courts—another stereotype … And it was an incredible exhibition, and it got a lot of controversial critique. It was at the Whitney Museum in New York, and people thought it was amazing. And then it came to Los Angeles to one of the museums on the campus of UCLA. And I and the ombudsperson at UCLA with whom I had done a lot of work [Howard Gadlin] were asked to create something, some museums do this now, it was amazing. We created a space in the last room of the exhibition and we trained mediators. They had t-shirts that said: "Have a question? Come talk to me." And so, we created this discussion space at the end of the exhibition where people could sit and talk to each other about what they saw. And the idea was, it's an art exhibition and it's supposed to get you thinking, instead of getting angry and punching somebody out or writing a bad review. I'd say the best part actually was training the students to be the mediators, because the students all came in with very strong views about what they liked or didn't like, but they all loved being mediators. And we just thought it was a brilliant idea. And I saw it once or twice after that in other places, but it never became institutionalized in any way. But that would be great to think in a soccer stadium, a football stadium, you'd have the little ones, especially young kids, with t-shirts with "Getting upset? Come talk to me" or something like that.

Marica

And this is a typical Carrie Menkel-Meadow moment that when you think that she has said everything, then she comes up with another brilliant idea for all of us to pick up. So, my brilliant friend, *Grazie*!

Carrie

Yeah. But you are *my* brilliant friend, Marica! I just want to say, I can't thank you enough for doing this whole project. It's just been amazing. And I haven't seen all of them. A few people have shared the pieces, not everybody. But it's just very heartwarming. And I want to thank you, my brilliant friend, for putting all this together and bringing us all together.

I just want to say, I don't know if it's going to work, but there's this wonderful retreat centre here in Bassano del Grappa. And I just picked up the brochure. So, I have a former student who has just made a full professor. She's Italian, but she teaches in France. She's coming to visit me next weekend. And she said, why don't we all go to Sardinia together next summer and together? So, we're going to, I'm going to talk to her. I'm going to talk to her about getting a place for us to all to get together. And if not, we can do it here in Bassano. Bob says it's too hard to get here. Sardinia is actually easier. But this is a beautiful little retreat centre on the Fiume Brenta, which is lovely. I saw some kids there who are doing wellness and other retreat-like programmes. I'm just thinking I would get a small group of my brilliant friends, you and the people that have contributed to this special issue, mostly women, but we'll let a few Robertos and a couple of other guys in. You know, just to celebrate life and all of that.

So we'll see if we can make it work. Then we can really have the lunch or the dinner around a table with all of us. That would really be fun. Yeah.

Marica

I can visualize already even the fabric and the colours of the tablecloth of the table for our dinners and all of us chatting and eating!

This is a moment in which violence and division have been normalized. So, for me, it's about celebrating you, who have created so much love, connections and good knowledge, instilling in us that being kind, honestly kind, is a way to show that violence and division are exceptions. We all need to be brilliant friends, and we all need a brilliant friend … with some Bobs around there, of course!

Carrie

And together. Well, there's a few of them, right? A few good men, a few, yeah.

One more thing before you stop. I just, you know, it's been a very weird period here because first Dolly Parton died, and then Gloria Steinem died, and then one of Gloria Steinem's partners in creating *Ms* magazine, Robin Morgan, who was very big in international feminism, died. Gloria, she was a kind person. And when you read all of these obituaries, they always say she was there for everybody. And so, part of this for me is, as you say, our messages are gendered. I'm sorry, I've said that a lot in my life and I continue to say it. Women in general tend to be kinder, whether that's because they're going to be mothers or whatever, but they are. And it's important to have role models. And so, in her death, Dolly Parton was a different kind of feminist, but she spoke to everybody, and everybody loved her music. And I'm not a country music girl, but I became one listening because it's music, and it made me joyful. I love singing her songs. And so, as you say, this is a moment. And I think we are female brilliant friends in this whole group that you put together. Okay, Michael [Palmer] and Bob Meadow and Nicholas [Parra-Herrera]. Nicholas is a pretty good guy too—a new generation … and a few others I have happily known. But, we need to keep our voices up in this moment and think about those women that went before us and keep it going.

Marica

We can also add a link to a song of Dolly Parton that the readers can listen to while reading your special issue, Carrie.

Carrie

Yeah, so let me just say, of Dolly Parton songs, I still like "9 to 5" the best because it is about women working (and I was a labour lawyer for a while), but my really favourite song is "Both Sides Now", the Judy Collins version—the version of it I always told Bob I wanted at my funeral. "Both sides now, I've looked at life from both sides now, looked at clouds from both sides now, I've looked at love from both sides." It's a wonderful song. And I think Joni Mitchell wrote it (1966), but Judy Collins has the version that I like. So, if we can find that, it's also for mediators, right? I've looked at both sides now and it ends with, "and I really don't know-clouds, or life, or love at all" or any of these things because they're complicated and we still have to have curiosity about life, love and clouds. It's a wonderful song.

Marica

Carrie, maybe we should explain why we call each other "my brilliant friend". Do you remember our fieldwork in Naples (July 2018) for our idea to write together about Elena Ferrante's four novels and how her work speaks to dispute resolution? The drawing at the end of the interview can give some idea of what we were doing.[2]

Carrie

Of course I remember. You took Roberto and me to the parts of Naples where the stories take place (the TV version used a set somewhere else) and explained what life would have been like there in the period she was writing. We saw some of the actual buildings and people in the markets—and we talked about family conflicts, major political conflicts at the time, love and rivalries of women deep in friendship and love, labour, poverty, the role of political and organized (crime) power, education and women's power. Here is one quote of hers I have kept for our work (book, article, theatre piece?):

> Maybe now is the moment to bet on a female vision of power — one constructed and imposed with the force of our achievements in every field. For now our exceptionalism is the exceptionalism of minorities. Men can afford to grant us some recognition with good-humored condescension because there are still too few truly autonomous women who can't be made subservient, who can't be dismissed by the expression, "You're so good, you seem like a man." (Ferrante 2019).

In that article she talks about the power of storytelling, where women do have power to tell their stories, and those of others. You expressed the view that maybe the women in Ferrante's world (Naples) might actually be more (emotionally) violent than the men (who were quite physically abusive). We set off on a conversation about how friends, women, family, politicians, men, the Mafia, parents, children and romantic partners do or do not engage in dispute resolution and how they do it—with words, with tears, with absence, with fists, with letters, with writing and, of course, with talking and yelling too … and women construct their own power … There is a whole world in those books still filled with so many ideas for us to continue to talk about, my brilliant friend. May we continue the conversation …

[2] The drawing is based on a photograph that Bob took of Carrie and Marica in Naples doing their fieldwork. Carrie and Marica wish to thank the author of the drawing Franki Barber @franki_makes.

Marica

Of course we will! We could deliver a full course on dispute resolution based on Elena Ferrante's books. The *My Brilliant Friend* collection speaks to theory and practice of dispute resolution; from the social construction of conflicts to the perception of the injustice, to the variety of ways disputes and conflicts are resolved. And more about the different parties … yes women, but I am struck also by the narrative of children dealing with disputes in Ferrante's books! So, my brilliant friend, after this I will be in touch for our next project on Elena Ferrante!

Thank you Carrie! We now invite the reader to listen to your favourite songs while reading the papers in this Special Section!



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Personal Reflections on Carrie Menkel-Meadow

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University of California Los Angeles School of Law south entrance. Carrie Menkel-Meadow taught here for 20 years (photo by Coolcaesar, licensed under CC 3.0).

For many people, for a host of different reasons, 1L (the first year of law school) is alienating. A particularly dissonant piece for me was the absence of the word "client" in core courses. I kept wondering who the *people* were in the cases we read. What sorts of lives did they lead before these disputes we were eavesdropping into? What did they say (or not say) to their lawyers prior to their names being permanently etched in reporters and casebooks? And what impact did the actions (or inaction) of their lawyers, and the judges assigned to hear their cases, have on their quality of life after the court cases ended?

Carrie Menkel-Meadow brought this missing "client" piece into her classrooms. In her professional responsibility (PR) course, which I

took in my third year of law school, Carrie complemented theory with vivid, personal, and concrete examples about the real people she served throughout her professional career and those we would soon be serving.

Long before the term "professional identity formation" became part of legal education parlance, Carrie did far more than just teach rules; she guided us to carefully consider who we could *become*—as lawyers, leaders, *and* people. Transformative! And revolutionary (then) *in a doctrinal course* to focus both on legal rules and on lawyering skills and values!

Carrie cared deeply about the content. It is hard not to care about PR. How does the rule of law survive if lying to a tribunal is fine, if conflicts of interest are laughed off, if incompetence is the norm? I teach PR now and I suspect that the importance I place on these rules and policies stems in part from my first learning them with Carrie.

The text I have assigned in my course includes excerpts from Carrie's scholarship along with a beautiful photo of her. When we read the chapter where Carrie's work is cited, I proudly tell my students, "She was *my* professor," and I smile, recalling Carrie rushing to class from finishing an article, appearing in court, or conducting some hugely significant mediation. She was clearly very busy, but instantly, full of enthusiasm and, nearly dancing as she pivoted around the podium, Carrie became entirely present. In stark contrast to some professors who let students know, intentionally or inadvertently, that their "truly important work" was *not* in the classroom, Carrie authentically showed us that different parts of her professional life could not only coexist, but could each thrive and were each essential.

Carrie was thoughtful, creative, and funny in class; she brought vivid illustrations of how professional and ethical choices figured into daily life, using her own stories along with accounts from colleagues, current events, TV, and film, engaging students with group exercises, discussions, and role plays. We laughed a lot—something that stands out from the usual law school experience. Carrie's eyes would sparkle as she grilled us on who had spotted which egregious violations in the most recent episodes of the lawyer shows she assigned as homework. In addition to learning rules in memorable context, these assignments taught us how important it is for legal scholars to interact thoughtfully with both intellectual and popular content.

And Carrie's commitment to students extended beyond the classroom. In one of many conversations after class, Carrie opened a vitally important professional identity door for me. It was toward the end of the semester

when I found the courage to share a stinging 1L memory: being ridiculed by my torts professor and classmates. Why? I asked how a plaintiff who had been severely injured would function in her day-to-day world. I tried to see her as a woman I might have known or encountered and mentally put myself in her shoes. My gaffe was to interject client-centred questions into a lesson that was planned to focus exclusively on various methods of calculating damages. My inquiry challenged (appropriately, I *now* know) the limitations of traditional litigation, and money damages. But my question was seen at the time as irrelevant, non-lawyerly, and "soft". The plaintiff in question wasn't the point; the sole issue was the relative merit of varying economic principles. I took us off course.

I shared the incident, about which I still felt shame (though undoubtedly, I also *now* appreciate, it was not something anyone else remembered). Carrie's response instantly and forever changed my professional self-image, and my future. First, she smiled—that genuine smile, the one that radiates pride when students probed deeply or questioned expansively. And what a wonderful feeling it was to receive genuine warmth in such a vulnerable setting! Next, Carrie declared in no uncertain terms that I *had* been "*thinking like a lawyer*", one with an intuitive understanding of problem-solving as context-based. She noted that I was thoughtfully questioning whether every case was meant for the adversary system, and, without yet possessing adequate terminology, examining the sufficiency (or lack thereof) of monetary damages and calling for a discussion of equitable relief. Carrie added, icing the already sweet cakes of vindication and validation, that *had she been teaching* that 1L class, she would have welcomed my comments, indeed lauded them as highlighting the need for a larger framework of dispute resolution, beyond litigation.

I share this account to underscore the depth, breadth, and power of Carrie's teaching and support of students generally, and I know that serving as classroom professor is just one of her many spheres of influence. Through her scholarship, Carrie has created an entire discipline—one that has and will continue to better our world. And, while many law professors focus on placing their works in only the most prestigious and elite law journals, Carrie publishes for every audience, at the highest academic levels and in an accessible manner for students and non-lawyers, consistently using her powerful words and thoughts to make the world a better place for us all. As a mediator, Carrie has resolved otherwise intractable disputes—at home and abroad. And as a colleague, friend, and family member, Carrie has impacted the legal profession, the academy, and everyone whose life she has been a part of.

For me, it was Carrie's holistic and distinctly human vision of law school as so much more than Langdell's "scientific" exploration of *appellate litigation* that changed everything. And apologies to *Wicked*, but, because I was lucky enough to be a student of Carrie's, I have been changed for the better, and, dare I say, profoundly changed for good.

So, on behalf of all the students you have ever taught and all the students I would never have taught but for you: **Thank you, Carrie!**

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Law and Human Intelligence(s)

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Abstract

This essay undertakes a comparison between human intelligence and artificial intelligence (AI) in the legal field, arguing that the first possesses cognitive, epistemological, emotional and affective abilities that are crucial for jurists and that the second could never learn. Taking Carrie Menkel-Meadow's teachings as the polestar, the essay will identify those fundamental abilities, analyse the features and limits of AI that make this latter incapable of learning such abilities, and finally make some suggestions on how we should develop the abilities at issue to lay down the foundations of a possible "Human Intelligence Project".

Keywords: human intelligence; artificial intelligence; legal professions; legal education; negotiation studies; legal skills; legal culture; nature of the law; conflict; dispute resolution.

It takes something more than intelligence to act intelligently.

(Fyodor Dostoyevsky, *Crime and Punishment*, 1993: 235)

Homo sum, humani nihil a me alienum puto.

(Terence, *Heautontimorumenos*, 2001)

[A] INTRODUCTION

It is a truth universally acknowledged in literature that every century has its own *mal du siècle* and its own artificial paradises.[1] While "spleen" remains a constant, even though under the far less romantic names of depression and alienation, absinthe has been replaced with new, more

* The authoress did not make any use of AI in conceiving, drafting or editing this essay.

[1] The expression "*mal du siècle*" comes from Romantic French literature and refers to a sentiment of world-weariness, a deep sense of distress, emptiness, loss, and *ennui*, combined with the perception of living in the wrong century. For more details on the origin of the concept, see Hoog and Brombert (1954: 42-51). As to the expression "artificial paradises", it is taken from a famous essay by the French poet Charles Baudelaire—*Les paradis artificiels*—about the relationship between drugs and poetic creation.

complex and sneaky forms of addictive depersonalization.[2] While the cursed poets spent their days and nights in the company of "the green fairy", nowadays crowds of individuals lose their identities in metaverses, preferring relationships with emotionless algorithms rather than real people (European Parliamentary Research Service 2026), abhorring sorrow rather than transforming it into art, abdicating their human intelligence (HI) to artificial intelligence (AI) and its "hallucinations".

The interaction between the two intelligences often reduces to an imitation game in which not only does AI mimic HI but HI mimics AI, taking this latter as a model, another self, or even a "super" self.[3]

This is a paradox, for at least three reasons. First, AI is a derivative or a product of HI. Secondly, AI only possess limited intelligence, to the point that we could reasonably challenge its very qualification in terms of an intelligent agent (Floridi 2025). Thirdly, each human being, rather than having one general intelligence of the kind that is measurable through logical, numerical and verbal reasoning tests, has several different faculties and potential competences that enable it to address a wide variety of problems (Gardner 1983; 1999).[4] In other words, humans do not possess only one kind of intelligence but multiple intelligences that "go beyond Socrates' rational man or Freud's irrational animal, each of which may be mobilized both by individual inclinations and cultural preferences or societal needs" (Menkel-Meadow 2001: 17), and "each individual has unique measures or expressions of these intelligences that

2 An interesting medical analysis of the sentiment of spleen described by Romantic poets can be found in Stanghellini and Ikkos (2024).

3 As observed by Sarikaya (2024: 651), also due to the influence of media portrayals "individuals are prone to erroneously deduce that artificial systems possess elevated levels of intelligence and a more human-like cognitive capacity than is accurate. Secondly, due to evolutionary psychological predispositions, humans inherently tend to conceptualise intelligence in a human-like manner. Thirdly, based on social cues, there is a tendency to ascribe a level of human-like intelligence to intelligent systems in direct interaction, surpassing what may be deemed contextually appropriate."

4 As Carrie underlines (Menkel-Meadow 2001: 118), Gardner "originally posited seven intelligences, as follows: 1) linguistic-word and language related; 2) logical-mathematical-use of logic, mathematical operations and scientific investigation; 3) musical-performance, composition and appreciation of musical patterns; 4) bodily-kinesthetic-use of body to solve problems (athletes, dancers, surgeons, craftspeople); 5) spatial-recognition and manipulation of patterns of wide or confined spaces; 6) interpersonal-capacity to understand the intentions, motivations and desires of other people, and ability to work well with other people; 7) intrapersonal-capacity to understand oneself; More recently, Gardner has added several new intelligences: 8) naturalist-expertise in the recognition and classification of numerous species of the environment; 9) spiritual-relation to supernatural world or larger cosmos; ability to achieve other states of consciousness; 10) existential-concern with ultimate issues and a capacity to locate oneself with respect to the furthest reaches of the cosmos and existence-ability to imagine and contemplate the infinite: the cognitive side of spiritual intelligence."

may be educated for and mobilized in different ways" (ibid), to the point that it would be more appropriate to talk about "human intelligences".

The three mentioned features make the imitation game vane—for AI could never reach the scope, width and depth of HI and, parallelly, HI could never attain the computational abilities of AI—yet not without consequences for HI. The most severe side-effect is that, by dint of mimicking AI or committing to it, HI ends up losing its humanity. The result is a "dehumanization of intelligence" (this expression has already been associated with AI by anthropologists: see Rose 2022) that, as mental health experts warn, entails a serious risk of leading to a dehumanization *tout court* (Dang & Liu 2025; Bender 2024).

What I intend to do in this essay is suggest a reflection on how the phenomenon at issue may affect the legal professions, or, from a different angle, what are those features of HI, which AI does not possess, that are fundamental in the legal field, taking as the paradigm of HI in the law our brilliant friend Carrie Menkel-Meadow, to whom this Special Section is dedicated. My argument is that HI in the law (as in many other fields) is irreplaceable and it cannot be reduced to the mere prompting ability, that is, to the ability of phrasing questions in a way as to obtain the right answers from an AI.

To demonstrate this, I will first discuss the scientific nature of the law and the cognitive as well as epistemological abilities that it requires from jurists [B]; then I will investigate whether and to what extent AI possesses such abilities, starting from what cognitive sciences teach us about AI learning processes, and ending with the identification of those mistakes that are typical of AI but unconceivable for humans [C]; in the following section I will discuss the artistic nature of law, pinpointing the emotional and affective abilities that jurists should possess [D]; then I will explore the emotional, affective and creative limits of AI; and, finally, I will provide some food for thoughts on the possible solutions to nourish and develop those HI skills that I have identified as fundamental for a jurist in the previous sections of the essay, in the hope that those reflections would serve as the basis for a new "Human Intelligence Project" [E].

[B] BACK TO BASICS: LAW AS A (HUMAN) SCIENCE

At least for what we call the Western legal tradition, having its roots in Roman law as studied and thought in the universities during the Middle Ages and in the system of writs developed by English courts at that time, law can be considered a science.[5]

This assumption—which is not just an orthodox and somehow old-fashioned way of conceiving the law, but reflects how the law was conceived at the origin of our legal tradition and explains our approach to legal problems—is justified on several grounds, that we may resume as follows: a) the law relies on a specific and autonomous semantic as well as conceptual apparatus which can only be mastered by an expert; b) legal norms, unlike other categories of norms, are drafted following deontic logic[6] modal operations (namely obligations, permissions, prohibitions, options and sanctions operators); c) legal reasoning relies (or should rely) in the first place on logical operations, namely syllogism subsumption (the act of including or placing something under a larger, more general group, category, or rule), inference (the act of drawing a logical result from known facts) by deduction or induction, inverse inference, counterfactual reasoning, analogy[7] and extension.

While law is a science, though, it is a peculiar one, as its referent is not nature but the human being, with its constant mutability: unlike the rules of the natural world—which are inherent in nature itself, universal and empirically verifiable—legal rules: a) are established by humans to govern human conducts, needs and conflicts; b) are highly contextual; c) cannot

[5] As resumed by Langdell (1879: viii): "Law, considered as a science … consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer." Several contributions have animated the debate on the theory at issue. Among them, see Grey (1983); and Schweber (1999).

[6] Deontic logic, whose father can be considered G H von Wright (1951), is the branch of symbolic logic that studies the formal properties of normative concepts. For this definition and a more in-depth understanding of the field, see Zuleta (2022).

[7] According to Sunstein (1993: 743-746), analogical reasoning works in four steps: "(1) Some fact pattern A has a certain characteristic X, or characteristics X, Y, and Z; (2) Fact pattern B differs from A in some respects but shares characteristics X … (3) The law treats A in a certain way; (4) Because B shares certain characteristics with A, the law should treat B the same way."

prove true or false upon application,[8] but useful, fair, proportionate, or efficient; d) cannot be applied without the medium of interpretation.

Comparative legal history taught us that it is illusionary to believe that law can be reduced to a mere syllogism—"The life of the law has not been logic: it has been experience" (Holmes 1963: 5)—and that it is utopistic to think that a judge could act as the simple "mouth of the law", as believed by the French school of legal thought named *École d'exégèse*, because legal rules do not pre-exist their interpretation. Legal rules are drafted by humans and cannot be applied as such, but need the medium of interpretation, which is again a human mental skill requiring a deep understanding of social and economic context, constitutional-rank values, and cultural shifts.[9]

It is not by chance that the continental Europe legal tradition stems from hermeneutics, namely, from the techniques for the interpretation of ancient Roman legal texts taught under the name of "*scientia juris*" in the universities during the Middle Ages, and that the criterion of the literal or plain interpretation is aided by several other canons of interpretation—teleological, axiological, constitutionally-oriented, harmonization-oriented—and by a criterion that is by nature too contextualized to be pre-programmed in an algorithm: consequential interpretation, that is, interpretation oriented to real-world outcomes, downstream effects, or practical social impacts of the application of a certain rule.

Those are the criteria that have enabled German judges and scholars to mitigate the rigour of the rules established by the civil code (the BGB), conceived to be "the calculating machine *par excellence*", via a massive concretization of its general clauses, such as good faith (*Treu un Glaube*). A strict and rational application of such rules would never have led to the elaboration of those general doctrines—like hardship, moral impossibility, unenforceability (*Unzumutbarkeit*), or the abuse of rights—

[8] I use, here, the terms "true" and "false" in their scientific meaning: a rule is true if it exists in the real world, while it is false if it does not exist and does not govern a certain real phenomenon. In my view the categories at issue are not useful to assess legal rules, unless we claim that "true" legal rules are the ones which are not only formally in force but substantively applied in a given context, and "false" if they are not substantively applied even though they are formally in force. For different perspectives, linking the binary event "true" or "false" to the debate about the foundation of the law, see the positivist and semantic legal theorists, namely Hart (1958; 1961), Austin (5th edn 1954 [1832]) , Austin (5th edn 1911 [1861]) and Bentham (1970).

[9] The paramount role of interpretation emerges powerfully in Dworkin (1986: sections 2-3) and leads the legal philosopher to the conclusion that: "Law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theatre of behaviour. … It is an interpretive, self-reflective attitude addressed to politics in the broadest sense. It is a protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances."

aimed at granting protection to occasionally weaker parties, that are still nowadays a pillar of the European private *law acquis*. Nor would it have led, in the common law legal tradition, to the development of equity, with its core institutions like trust, estoppel or the prohibition of usury.

In addition to that, the contamination of comparative law with other sciences (on which see the fundamental analysis of Foster & Ors 2016)—like anthropology, sociology, linguistics and neurosciences (Garland 2004; Zeki & Goodenough 2006; Freeman 2011; Jones & Ors 2013)—has revealed that the law has a tacit, and sometimes underground or "chthonic", dimension (Glenn 2010: 23-113), which is even more significant and emblematic of the distinctive elements of legal traditions than the expressed dimension, as it is the "alpha" of the law (Sacco 2015: 108-120).

First, there are legal rules and practices that govern legal communities and social order but remain unwritten and often unverbalized,[10] those rules that are deeply rooted in a given society and grounded on common sense, traditions, shared values, therefore followed spontaneously as

[10] The existence of unexpressed legal rules as fundamental and primal formants of legal traditions and legal systems has been the object of a conspicuous number of contributions investigating the concept of law in the most diverse historical periods. Among the most important, and starting from the less recent, one can mention Aquinas (trans 2002); Austin (5th edn 1954 [1832]: Lecture I) and Austin (5th edn 1911 [1861]: Lecture I) who addressed how unwritten, customary laws receive legal validity through the implicit consent of the political sovereign, famously known as a "tacit command"; Ehrlich (1913/1936), who argued that the formal law found in codes and statutes is only a fraction of legal reality, proposing instead that what he calls the "living law" dominates the inner order of social associations; Hart (1961) who—in rejection of Austin's idea of "tacit command"—posited that every mature legal system rests on a fundamental rule called the "Rule of Recognition", which is an unwritten, shared social practice accepted by judges and legal officials that dictates what counts as valid law, and noted that primitive societies rely purely on unwritten, informal "primary rules" of obligation (customs), while modern legal systems merge these with unwritten or written "secondary rules" that dictate how those primary rules are introduced, changed, and adjudicated; Fuller (1964), who approached unwritten law from a procedural natural law perspective, arguing that law is not just a collection of written statutes, but a purposeful, collaborative human enterprise; Dworkin (1977), who argued that legal systems are widely governed by unwritten standards that he distinguished as legal principles. According to Dworkin, when judges face difficult cases where the written statutes are silent or ambiguous, they do not just invent new laws using absolute discretion, but rely on unwritten, underlying legal principles deeply embedded in the legal system's history and morality—such as the principle that "no man may profit from his own wrong". These unwritten principles carry immense legal weight and bind judges just as strongly as written code.

though they were provided by an inherent legitimacy, unlike the artificial and changeable state law.[11]

Secondly, there are legal rules, patterns, or formants that not only are unverbalized but also unconscious, that is, they lack explicit linguistic formulation, remaining hidden beneath the surface of the text, but influence the subconscious mentality of judges and jurists, standing between the interpretation of the rule and its application, sometimes leading them to apply formally identical rules in different ways. This is the other side of the "tacit dimension" of law (Polanyi 1966: 4), and we may refer to such hidden formants of the legal systems as "legal crypto-types" (Sacco 1991).[12]

If all that is true, then interpretation requires specific skills that go beyond pure logic: cognitive skills as well as linguistic cognition skills and epistemological ones. Beginning with cognitive skills, the interpretation of legal texts or precedents does not only require categorization and schema matching (ie the ability to map complex facts onto abstract legal definitions), cognitive transfer or the "art of distinguishing" (ie abstracting the *ratio decidendi* of a precedent and identifying the functional equivalence between the facts of that case and of the new case), and structural decomposition (ie the ability to navigate multiparty statutory tests, nested definitions and complex cross-referencing without losing

[11] The opposition between unexpressed law—also referred to as "mute" or "silent" law (Sacco 1993; 1995; 2015)—and state law has been central to any philosophical reflection on the concept of law, whatever the historical period in which the reflection has been engaged and whatever the legal culture of reference. As to the Western legal culture, one of the most paradigmatic examples, a pillar of Western humanism, is the opposition between "*physis*" (natural law, in Latin "*jus*") and "*nomos*" (state law, in Latin "*lex*") that can be found in Sophocles' *Antigone* (Sophocles trans 1994: on which see Thomas 2005: 41-42 and 50-52). In the ancient Greek tragedy at issue, King Creon promulgates an edict forbidding the burial of Antigone's brother, Polyneices. Antigone dismisses Creon's order as a mere *kerygma*, ie the temporary words of a mortal man, by appealing to the "*agrapta kasphale theon nomima*", ie the unwritten and unfailing laws of the gods, which are perennial as an expression of divine justice (*themis*). As to Oriental legal cultures, the opposition in question is grounded in ancient Chinese philosophy and lies at the basis of the conflict between Confucianism and legalism about how society should be governed: *jus* corresponds to "*Li*", which refers to the unwritten codes of conduct, traditional rituals, ethics, propriety and morality, and social hierarchy and guides human behaviour through education, moral duty and social shame; "*Fa*" refers to public written and objective statutory law that guides human behaviour through punishments and rewards (on the topic, see Bodde & Morris 1967).

[12] The expression "crypto-types" is borrowed from linguistics, where it was coined by the linguist Benjamin Lee Whorf to describe invisible, hidden grammatical patterns in a language that speakers follow perfectly without being consciously aware of them (Whorf 1945: 4–5). The idea underlying the concept of legal crypto-types had already been expressed by renowned legal philosophers and scholars, namely Hayek (1973: 43-44); Fuller (1969: 205-207); and Dworkin (1986: 31), where he claims that: "Our rules for using 'law' tie law to plain historical fact. It does not follow that all lawyers are aware of these rules in the sense of being able to state them in some crisp and comprehensive form. For we all follow rules given by our common language of which we are not fully aware."

sight of the system). Interpretation also requires what we call cognitive flexibility or metacognition, that is, the capacity to shift perspective between competing interpretive canons and actively monitor one's own cognitive biases, in particular confirmation bias or anchor bias in judicial decision-making (Guthrie & Ors 2001: 778-780, 816-821).

Moving to linguistic cognition skills, legal interpretation requires: a) the ability to deconstruct sentence structures with the purpose of identifying how modifiers, punctuation, conjuncts, and disjuncts alter legal duties (Scalia & Garner 2012: 69-140); b) the ability to decode the intent or purpose behind an utterance (legislative intent) by evaluating pragmatic context rather than relying solely on literal definitions (Barak 2005: 88-110); c) the ability to perform counterfactual reasoning, namely, to mentally test the proposed interpretations against hypothetical future scenarios, for the purpose of ensuring legal consistency and avoiding absurd results.

Ending with epistemological skills, the interpretation of legal texts, including precedents, requires: a) the capacity to assess the validity, relevance and reliability of factual evidence presented to trigger a legal rule, which involves calibrating findings of facts against legal epistemic thresholds like preponderance of evidence versus the beyond a reasonable doubt criterion; b) the capacity to evaluate whether the proposed interpretation is logically consistent with the context and the system (internal coherence) and compliant with constitutional principles or overarching institutional norms (external coherence); c) the ability to evaluate the legitimacy and force of such sources ("hard" or "soft law"), given that the legal system cannot be reduced anymore to the Kelsen pyramid but should rather be conceived as a network of heterogeneous sources; d) what we may call "epistemic humility", specifically, the ability to recognize the inherent gaps, vagueness, and defeasibility of legal rules, and to accept that legal conclusions are hardly ever universally proven truths, but rather rationally justified assertions subject to counter-arguments and revision.

The question I will deal with in the next section is whether AI possesses the above-mentioned cognitive, linguistic and epistemological abilities.

[C] COGNITIVE AND EPISTEMOLOGICAL LIMITS OF AI

AI systems are based on analytical models that enable them to mimic human behaviour and generate predictions, rules, answers, recommendations, diagnoses or decisions. In performing those tasks, AI systems are confronted with the same problems faced by HI, ranging from logical reasoning, learning, knowledge representation, perception and communication, strategic application, planning and decision-making in non-predetermined contexts.

Given the identity of cognitive challenges, to perform tasks identical to the ones performed by humans, AI would have to learn from humans how to be intelligent. In other words, AI would need to receive specific training capable of triggering in the system the same learning processes on which the human mind relies. The first question we should ask ourselves is whether that would be desirable, and the second is whether—or, more correctly, to what extent—that would be possible.

As to the desirability of training AI to be human—forgetting for an instant the complexity of the question that carries with it also philosophical, moral and even religious implications—my straightforward answer would be no. If we want to avoid the advent of a technocratic era fit for a dystopic novel, we should maintain an anthropocentric perspective. Such a perspective remains a pillar of the European Union approach to AI governance and is concretized by European legislation, namely the AI Act, in the principle of "human oversight". I would go even further claiming that HI should not be reduced to a supervisor of AI, but each of the two intelligences should have their own separate, though communicating, field of competence. In this perspective, AI should not be trained to replace HI or become a sort of modern oracle but exclusively to fill those gaps that HI inevitably has, in a reliable and transparent way. That should be the focus: AI should be trained to improve all those features that make it an "artificial" intelligence, namely its computational abilities, and, parallelly, as I will discuss later in the contribution, HI should be trained to strengthen its human potential.

As to the possibility of training AI to replace HI, we should acknowledge that, for now, the learning processes that govern the artificial "mind" remain different from the ones that govern the human mind, as I will attempt to show hereafter, drawing from the research undertaken in the field by cognitive scientists and psychologists.

The first AI systems were trained following what is called a knowledge base model. Programmers hard-coded in formal language rules, facts, statements and object categories about the world, and the system processed such elements using logical inference rules to deduce answers or make predictions or decisions without needing raw sensory training data (Goodfellow & Ors 2016). The model failed for two main intertwined reasons: on the one hand, following the approach at issue, the knowledge of the AI system is entirely dependent from and limited to what has been hard-coded by the programmers; on the other hand, no programmer could think in advance of every possible rule in the world (also because of tacit or crypto-typical knowledge) or devise formal rules in a sufficiently complex way so as to accurately describe the complexity which is inherent in reality.[13]

This failure led to the adoption of a new approach: machine learning. Roughly speaking, this model uses learning algorithms that are able to learn from data, where "learning" means that the machine can improve its performance of the task for which it has been designed by experience, and "task" means processing a collection of features (technically referred to as examples) that have been quantitatively measured from some object or event. A type of task can be, for example, object recognition, where the machine is asked to process an image (an input made of a set of pixel brightness values) and issue as an output a numeric code identifying the object in the image (Goodfellow & Ors 2016: 100).

Based on what kind of experience machines are allowed to have during the learning process, we can categorize machine-learning algorithms as supervised or unsupervised. Both categories experience a dataset containing several features, but in the first each collection of features is also associated with a label or target so that it is the instructor who tells the machine what to do with the data, while in the second the algorithm

[13] Goodfellow and colleagues (2016) provide an eloquent example of that, drawn from one of the most famous "knowledge base" projects: Cyc of 1989. According to the authors, Cyc "failed to understand a story about a person named Fred shaving in the morning (Linde 1992). Its inference engine detected an inconsistency in the story: it knew that people do not have electrical parts, but because Fred was holding an electric razor, it believed the entity 'FredWhileShaving' contained electrical parts. It therefore asked whether Fred was still a person while he was shaving."

must learn to make sense of the data (eg find patterns) without the instructor's guidance.[14]

To this we must add that some algorithms do not just experience a fixed dataset but interact with a given environment, in a way that there is a feedback loop between the learning system and its experiences, a model referred to as reinforcement learning. In the model at issue, the instructors do not provide input and output pairs but "describe the current state of the system, specify a goal, provide a list of allowable actions and their environmental constraints for their outcomes, and let the ML model experience the process of achieving the goal by itself using the principle of trial and error to maximize a reward" (Janiesch & Ors 2021: 687).

The most advanced type of machine learning, at least for now, is deep learning, a model based on artificial neural networks made of interconnected layers. The interesting point about this model is that it draws inspiration from the architecture of the human brain: a neural net consists of thousands or millions of simple processing nodes that are densely interconnected.[15] Scientists, though, warn that, despite the similarity between artificial neurons' architecture and that of the brain, the learning processes are different. Modern deep learning is mostly guided by applied mathematical fundamentals like linear algebra, probability, information theory, and numerical optimization, rather than

[14] In more technical words, supervised learning "requires a training dataset that covers examples for the input as well as labeled answers or target values for the output. An example could be the prediction of active users subscribed to a market platform in a month's time as output (considered as the target variable or y variable) based on different input characteristics, such as the number of sold products or positive user reviews (often referred to as input features or x variables). The pairs of input and output data in the training set are then used to calibrate the open parameters of the ML model. Once the model has been successfully trained, it can be used to predict the target variable y given new or unseen data points of the input features x." (Janiesch & Ors 2021: 687). Instead, in unsupervised learning the system is supposed to detect patterns without any pre-existing labels or specifications. In this case, the training data "only consists of variables x with the goal of finding structural information of interest, such as groups of elements that share common properties (known as clustering) or data representations that are projected from a high-dimensional space into a lower one (known as dimensionality reduction)" (ibid: 687). The model is applied, eg, to group customers or markets into segments for the purpose of a more target-group specific communication.

[15] A clear and jurist-friendly illustration can be found in Hardesty (2017): "In most nets the nodes are organized into layers and 'feed-forward', as data moves through them in only one direction. A node might be connected to several nodes in the layer beneath it, from which it receives data, and several nodes in the layer above it, to which it sends data. To each of its incoming connections, a node will assign a weight. When the network is active, the node receives a different data item, represented as a number, over each of its connections and multiplies it by the associated weight. It then adds the resulting products together, yielding a single number. If that number is below a threshold value, the node passes no data to the next layer. If the number exceeds the threshold value, the node 'fires', which in today's neural nets generally means sending the number – the sum of the weighted inputs – along all its outgoing connections."

neuroscience, as we do not possess a deep enough understanding of the actual algorithms used by the human brain (Goodfellow & Ors 2016).

However, as highlighted by literature (Sarikaya 2024: 651), we can claim that human learning is characterized by a capacity for abstraction, generalization, and creative synthesis that differentiate it from machine learning, even under the form of deep learning. Literature describes that difference in the following way: "while humans effortlessly assimilate knowledge from diverse sensory inputs and experiential interactions, machines rely on meticulously crafted algorithms and vast datasets to discern patterns and derive insights" (Sarikaya 2024: 651).

This difference entails at least three consequences: 1) AI thinks in ways that are significantly different from the typical ways of the human mind; 2) AI makes errors that would be unconceivable for HI; 3) AI does not possess the same affective or emotional skills of HI. Leaving the third feature for later, we will deal here with the first and the second ones.

Beginning with AI's way of thinking and applying it to the legal field in the light of the observations of section [B], we can claim that AI does not possess genuine cognitive intentionality or epistemological agency. Instead, modern generative AI performs statistical simulation of semantic patterns, while symbolic legal AI performs computational execution of formal rules. While AI displays functional competence across several surface-level legal tasks, it encounters hard structural limits when faced with high-level legal interpretation, normative evaluation, and contextual judgement.

From a cognitive viewpoint, AI excels at abilities like high-dimensional pattern matching, structural summarization or syntactic translation, and the identification of surface-level factual distinctions across legal documents but lacks embodied experience and working-memory schema integration. In complex case-based reasoning (such as distinguishing precedents across multi-level legal hierarchies), AI performance degrades sharply, dropping from high accuracy on simple distinctions to low accuracy on integrated legal synthesis (Schwarcz & Ors 2025).

From the epistemological viewpoint, AI can rapidly retrieve statutory provisions, predict text likelihoods, and propose candidate readings of a legal clause (Janeček & Sartor 2026), but lacks epistemic commitment, namely the capacity to hold beliefs, evaluate legal truth (we will talk about AI "hallucination" later in this section) or normative legitimacy of legal sources or competing societal values, or stand accountable for justification (Thaldar 2025).

Moreover, from the viewpoint of hermeneutical skills, AI is capable of parsing complex sentence syntax, deconstructing nested statutory conditions, and identifying grammatical conjuncts and disjuncts, but it operates exclusively at the syntactic level, while it cannot experience the lived social context required to resolve semantic vagueness or open-textured statutory language (Janeček & Sartor 2026).

Finally, from the viewpoint of deontic logic skills, we may claim that AI is capable, via symbolic engines, of executing formal propositional logic, standard deontic operators, and basic deductive syllogisms flawlessly, but it fails when it encounters rules subject to unstated exceptions and competing canons of interpretation.

Moving to AI mistakes, these latter do not follow the patterns that have been detected and mapped for humans (Chong 2025: 3). First, unlike human mistakes, AI mistakes do not cluster around especially difficult topics—and, moreover, AI would not have the same perception of difficulty as we do—but appear almost randomly across all subjects, therefore resulting in being far more unpredictable though avoidable through the establishment of risk anticipation/prevention strategies and practices.

Connected to the feature we have just mentioned, there is another point: AI systems never hesitate or have doubts about their decisions, even when these latter prove spectacularly wrong, therefore they can "state absurdities with the same assurance as established facts" (ibid), as happens when AI invents inexistent legal precedents or random guesses the precedential relationship between two different cases instead of measuring it.[16] We commonly refer to those cases as "AI hallucinations", but, perhaps, it would me more correct to use an expression like "confabulation", as "hallucination" is a typically human experience, and AI does not have conscious experience or conscious perception.[17] Thus, AI disregards one of the pillars on which knowledge rests: the Socratic association between wisdom and the awareness of knowing nothing.[18]

Furthermore, AI is too sensitive to context, and more precisely to the way prompts are phrased: AI systems may provide different answers

[16] On the topic, see Ho (2026), Magesh (2025) and Curlin (2025).

[17] This is the suggestion of McJohn and McJohn (2026), who attempt to show that talking about "confabulation" (a term borrowed from neurology 'used when someone invents a false explanation or fact or other idea, not because they are being deliberately deceptive but rather because they simply are filling in a cognitive blank') rather than 'hallucination' would entail a change of paradigm from the legal viewpoint.

[18] In the *Apology* by Plato, Socrates explains: "I am wiser than this man; for neither of us appears to know anything great and good, but he fancies he knows something, although he knows nothing; whereas I, as I do not know anything, do not fancy I do."

(outputs) to identical questions (inputs) just because these latter slightly differ from each other in their formulation, as happened, for example, in the famous generative AI copyright infringement cases referred to as the "Italian Plumber Problem"[19] or the "Snoopy problem" (Sag 2023). Moreover, AI systems encounter problems in classifying images, as, for now, they do not have the semantic vocabulary to express descriptively the criteria they have learned and used in the classification task. Even just changing some individual pixels and making the image more blurred can lead AI to qualify a dog as a cake or a couple from central Africa as gorillas (Grant & Hill 2023). Those weaknesses, besides leading to infringements of fundamental rights, make AI systems easy to manipulate or jailbreak for the purpose of bypassing their built-in safety measures.[20]

On the one hand, the above-illustrated mistakes would never be made by common HI in full possession of its faculties; on the other, AI would not make those "errors" that human judges or legislators or legal professionals in general deliberately make to align the law with justice—a central issue in Carrie's narrative (Menkel-Meadow 2013: 80)—or at least fairness; those "errors" that most of the time come from a moral imperative having its deepest roots in the most intimate dimension of the law: the affective or emotional one. I will explore this dimension in the section hereafter.

[D] LAW AS A (HUMAN) ART

We began our reflection in section [B] by stating that law is a science; now we must add another piece to the mosaic: law is not only a science, but also an art. As Carrie powerfully wrote: "law and lawyering are part of an artistic, intuitive sensibility that reminds us that we are humans, not chemical elements or plant sub-species that can be fixed in taxonomic categories" (Menkel-Meadow 1994: 603). As another giant of Western legal thought once said, the law is inherent in the spirit of the people—what he called the *Volksgeist*—just like art, music, literature and the other cultural products of HI (Savigny 1814/1831).

What makes law an art is its connection with the most intimate side of human nature: human needs, feelings, emotions, passions, instincts, beliefs … The *trait d'union* between this humanity and the law is conflict.

[19] The expression has been first used by Lee and Grimmelmann (2024). Basically, if you ask generative AI to make an image with the famous Nintendo character Super Mario, the system refuses to do so on copyright infringement grounds but, if you ask it to make an image with an Italian plumber, the system will produce an image of Super Mario.

[20] Eg an AI system may refuse to give instructions for building dangerous devices if asked straightforwardly to do so but provide those instructions if the same question is presented as a pattern of symbols (Chong 2025: 4-5).

Law is about the resolution of conflicts, and conflicts are human to their bones, as they involve all the elements I have just mentioned. It is not by mere casualty that the foundations on which dispute resolution rests are not exclusively legal but come from "the broader pastiche of the social sciences (anthropology, political science, international relations, sociology, psychology, history, economics, and game theory) and their more multidisciplinary social activist spinoffs, such as peace studies, social movement theory and practice, and conflict resolution" (Menkel-Meadow 2004: 13-14).

As our brilliant friend Carrie suggests, behind the scenes of dispute resolution lies a cross-cutting field—"dispute processing"—whose focus is not that of legal cases but—much broader—that of "culturally and contextually embedded 'disputes' having existences, before, during, and after formal legal disputes" (ibid: 12).

The conflict landscape is so varied that several typologies and taxonomies have been identified by sociologists and social psychologists: material versus nonmaterial (value- or needs-based) conflicts; perceptual, behavioural, and attitudinal conflicts; malleability or changeability of the res in conflict; numbers of parties in conflict (dyadic versus multiparty); intergroup (eg nation-state) versus intragroup (organizational) conflicts; and intrapersonal versus interpersonal conflicts (ibid: 13-14). Besides, in all decision-making processes Carrie identifies at least three "modes" of discourse that are human by nature: the rational-principled (brain), interest-based bargaining and trading (stomach), and the affective-emotional-value based (heart) (Menkel-Meadow 2018: 9-10).

According to the social philosopher Stuart Hampshire, whose theory is particularly dear to Carrie (Menkel-Meadow 2004: 8), being aware that conflict is human, that it is necessary for defining what is important about oneself and the polity to which individuals belong, and for instigating important social change, is crucial to understanding the importance of fairness in procedures for solving conflicts, therefore the importance of justice itself. Given the humanity of conflict, the "skillful management of conflicts [is] among the highest of human skills" (Hampshire 2000: 35).

As Carrie puts it, conflict resolution is:

> a human skill (to be theorized about, taught, learned, and practiced) and a difficult but highly valued one at that. I would add it is more than a single skill, constituting a multidimensional set of skills, implicating abilities to listen, articulate, advocate, empathize, analyse, facilitate, create, manage, and care about people and their problems, issues, values, and material well-being (Menkel-Meadow 2004: 9).

In other words, the ability to discern those conflicts, understand their implications and solve them is an art that not only relies on technical or "hard" skills—rhetoric, problem-solving, mastery of legal vocabulary and legal reasoning,[21] argumentation, interpretation in all its forms, distinction, question framing, logic (induction, deduction), synthesis as well as analysis, abstraction as well as concretization—but also, and widely, on human affective or emotional skills.[22]

Among those skills I would select two, that lead to others and lie at the core of Carrie's narrative, as the key to accomplish the mission of reconciling the two souls of justice—the legal and the human one—and "make the world as just and 'safe' (peaceful) enough for human flourishing":[23] empathy and creativity, which Carrie has taught and practised—as a professor, negotiator, lawyer and woman—throughout her life, being guided by the strong belief that this ability, made up of active listening, communication, genuine interaction, overcoming of personal limits and identification with the views and perception of others, coupled with creative problem-solving, plays a paramount role in the construction of a more peaceful world resting on the mutual understanding between human beings.

Beginning with empathy, Carrie upholds Alfie Kohn's definition,[24] according to which it implies coming to "understand the situation of the other by experiencing her emotion and understanding her experience from her perspective" by "imagining oneself to be in the position of the

[21] Eg the skills of "parsing cases, 'spotting' issues, separating the holding from the dictum, the relevant from the irrelevant fact, and the law from the policy" (Menkel-Meadow 1994: 616).

[22] In Carrie's words, "conflict resolution involves both cognitive (the 'science' or analysis of any conflict or dispute) and behavioral (the 'art' and practice of conflict resolution and problem solving) components. We must learn to analyze and understand what conflicts and disputes are about, in their full contextual complexity, before we can choose the appropriate behavioral response. Once we have decided on our goals and desired outcomes, we can seek to achieve them with a broader repertoire of processes and behaviors (whether goals are defined as maximizing individual or joint gain, or seeking Pareto-optimal or 'just' solutions). That broader repertoire of behaviors (communication skills, creative problem solving, questioning, as well as persuading, listening, synthesizing, as well as analyzing) can and must be taught" (Menkel-Meadow 2004: 18). On the topic, see also Menkel-Meadow (1983; 1993; 1994; 1999; 2001).

[23] Menkel-Meadow (2013: 80). As Carrie wrote, the purposes mentioned in the text could be reached by "developing legal and other processes that encourage the 'best' in us to seek creative, less rigid, more contingent, and more tailored solutions to a wide variety of human problems that wind up in the legal system or become sources of serious human strife, hostility and war".

[24] Kohn (1990). The etymological origin of the word empathy lies in the ancient Greek word *empàtheia* (ἐμπάθεια), a compound word combining "*en*" (in or at) and "*pathos*" (feeling, passion, or suffering), but the word had a different meaning—a strong state of passion or emotion—that gained a negative nuance in modern Greek, where the word means malice, prejudice, spite, or hatred rather than emotional resonance. Instead, the concept we nowadays associate with the word empathy comes from *Einfühlung* (literally "feeling into"), a word coined in 1873 by the German aesthetic philosopher Robert Vischer. For more details, see Wispé (1987: 17).

other" (Menkel-Meadow 1982: 389). In this meaning, empathy is a process articulated in three stages: "perception or apprehending the situation of the other; cognition or understanding the meanings of the situation of the other; and affect or feeling the emotional content of the other's experience, from her perspective, called "perspective-taking" in social psychology literature" (ibid).

Empathy is uncontroversially an important skill for lawyers both in "behind-the-table" relationships, namely in the relationship with clients, and in across-the-table relationships, that is, the relationships with the counterparties, both in negotiation and in litigation.

As to the lawyer–client relationship, almost any case carries emotional components for the client, either intimately linked to the fact situation or to the trial *per se* (fear of appearing in court, fear of the sentence or the financial consequences of the judgment …). A significant number of scholarly and professional contributions have been highlighting that lawyers who are empathic with clients can strengthen the case and increase the client's satisfaction (see, for all, Goodpaster 1975; Barkai & Fine 1982-1983; Gerdy 2008; 2013).

In litigation, empathy could help lawyers train their clients for court and support them in order to avoid the risk that their emotional side turns into a weakness in cross-examination or alienates the jury. In negotiation, empathy enables the lawyer–negotiator to accomplish the various steps of problem-solving, namely identifying both parties' needs and objectives and creating solutions (Menkel-Meadow 1984). These latter remarks also explain the importance of empathy for the other players of alternative dispute resolution, like mediators, negotiators, facilitators and neutral evaluators, and for the professionals involved in restorative justice processes (Menkel-Meadow 2007).

As to the relationship between the lawyer and their client's counterparty, empathy is, first of all, important in the perspective of settlement, as it can help the lawyer–negotiator: a) "plant a trust landmine" with the other party; b) identify the right questions to ask; c) unearth the other party's real concerns and bring them into the negotiation so that they can be traded with the client's needs ("expanding the pie"). Empathy could be useful even in litigation and serve an adversarial logic, as understanding the emotional sphere of the other party could help the lawyer conduct cross-examination more efficiently and anticipate the other party's moves.

More controversial is whether empathy is a quality a judge should possess. Without entering the arena,[25] my view is that judges should be emphatic within the limits of impartiality. Unlike sympathy, empathy does not refer to the capacity of feeling compassion or other emotions for weaker parties, but to the capacity to understand the perspective (perspective-taking) (Bandes 2009) and feel the emotions of all the parties involved (Colby 2012: 1963). In other words, empathy in judging "centers on an ability to truly understand the human dimension of the case—the effects of the judge's ruling on all of the people who will be affected by it" (Colby 2012: 1964).

This capacity to "gain an empathic appreciation of the case from the perspective of all of the litigants" (Colby 2012: 1966) is fundamental for at least four tasks that are inherent in judicial decision-making and somehow interconnected: the reasonableness test (Colby 2012: 1978), the balancing test (Colby 2012: 1977), and I would add the proportionality test—which guides the judge in the choice of the measure that is, at the same time, the most adequate and effective and the less affective for the parties' interests—as well as the consequence-oriented interpretation.

Besides, even if we claim that judges should not be empathic, our claim will not be able to prevent them from empathizing with a familiar perspective because this is an ontological human bias. What is important, to avoid empathy undermining impartiality, is appropriate awareness-raising: judges should be trained to manage empathy, that is, to "overcome the natural inclination to empathize more with those whose experiences and circumstances resemble one's own" and to "empathize with those who are most different from and unfamiliar to them, and whose interests and perspectives they are likely to naturally undervalue" (Colby 2012: 1991).

For that purpose, empathy should be linked to another important quality: sensitivity to the context and to cultural factors, in a broad sense. Perspective taking—which is, as said, a fundamental component of empathy—would be incomplete without an adequate understanding of cultural variations in conflicts (Menkel-Meadow 2004: 14), namely, differences based on gender (Menkel-Meadow 2012), ethnicity, religion or ideology.

Moving on to creativity, which is necessary for Carrie in human conflict resolution for the future survival of humanity (Menkel-Meadow 2004: 7-8), I would uphold the position of those psychologists who define it

[25] The debate has been very heated: see, for all, Henderson 1987; Bandes 2009; 2011; Colby 2012; West 2013; and Fissell 2016.

as “a process by which a symbolic domain in the culture is changed” or as “any act, idea or product that changes an existing domain or that transforms an existing domain into a new one” (Csikszentmihalyi 1996: 8, 28). Literature in the field identifies two components which must be cumulatively present to qualify a process as creative: originality or novelty, and effectiveness or utility (Runco & Jaeger 2012).

The first requirement is met when a certain process or output is unusual, uncommon or unique to existing baselines (Runco& Jaeger 2012). The process or output may consist of solving problems, creating products, raising issues in a given domain in a new way, asking new questions, creating fields that did not exist before (Gardner 1999: 116-119). The second requirement is met when the original process or output is adaptive, appropriate, useful, or value-generating within its applicable domain (Runco & Jaeger 2012).

In legal terms, creativity may be considered as the ability to think out of the box in analysing legal problems and to imagine solutions that are outside the typical existing patterns: conceiving new doctrines, overruling precedents, acknowledging new rights or interests worthy of protection, finding new remedies (remedial imagination), as Italian case law did when it concretized the general clause of contractual good faith contained in the civil code by holding that in case of hardship the parties have a duty to renegotiate the terms of the contract, extending the range of issues to be negotiated, and find new processes to solve conflicts—the last two may fall under the umbrella of what Carrie calls “creative problem solving” (Menkel-Meadow 2001).

So-described, creativity is uncontroversially a skill that every category of jurists should possess—whether they are lawyers, notaries, negotiators, mediators, neutral evaluators, arbitrators, judges or law professors. There is no need to indulge in explaining why.

Creativity as creative problem-solving serves another purpose that is crucial in Carry’s work: process pluralism, which is what allows the change of paradigm from alternative dispute resolution to appropriate dispute resolution. In fact, process pluralism allows us to choose different processes for functional or other reasons, to prefer to adversarial processes, which limit the field of possible outcomes, more creative ones, focused on joint-gain, wealth-creating, and the emergence of satisfactory possibilities (Menkel Meadow 2004: 10; 1984).

As Carrie teaches us—and I will further discuss this in the last section of this essay—creativity is a buildable skill that relies on other human

abilities that can be trained, such as flexibility, intuition, instinctiveness and improvisation, which could be defined as the ability to react expeditiously and effectively in unpredictable and unexpected moments.[26] Those, as well, are all sub-skills that are crucial for jurists whatever their profession or role might be. The question I will deal with in the next section is whether AI possesses the above-mentioned affective, emotional and artistic abilities.

[E] AFFECTIVE AND EMOTIONAL LIMITS OF AI

According to the futurist Jeremy Rifkin, humans are wired, in their neuron paths and learned responses, to feel our fellow beings' plights. For Rifkin, the story of human development is one of ever transforming consciousness; human beings are like children who, first, become conscious of themselves and their needs, then come to recognize the ability to transform that consciousness (also through education, social interaction, experience) and, subsequently, as they begin to understand the concepts of their own and other's mortality, they empathize and develop human understanding (Rifkin 2009).

Well, as I will attempt to demonstrate, AI is like a human child—virgin of all knowledge until programmed and trained—but without mirror neurons. Unlike AI, HI relies on several innate mechanisms identified and studied by multiple psychological disciplines, such as mentalizing or perspective-taking, that allow humans to understand other humans when they interact with them, that is, to predict what they are thinking and guess what they feel and how they will behave in many situations (Sarikaya 2024: 654).

In other words, these mechanisms enable humans to put themselves into other humans' shoes, to have an intuitive understanding of what others perceive, know, believe, and experience (Sarikaya 2024: 654). This is made possible, on the one hand, by the fact that HI forms theories and assumptions about other humans' emotions through experience and socialization, and, on the other hand, by the fact that HI can simulate other humans' experiences, that is, it can directly imagine how other people feel (ibid).

[26] See Balachandra and colleagues (2005: 416): "Negotiation is a fascinating subject in part because the process is so often unpredictable. External events outside the control of the parties – unexpected outbursts, accidentally pressing someone's 'emotional hot button,' learning critical new facts about the issues being negotiated – can intrude at any time. A negotiator who learns to react effectively in unpredictable moments clearly is an improviser. He or she somehow manages to cope regardless of the people, the problem, or the process in place."

"*Homo sum, humani nihil humani a me alienum puto* [I am a human being; I consider nothing that is human alien to me]"—claims a character in one of the famous ancient roman comedies by Terence (2001) (Terentius Afer 165 BCE). This sentence powerfully enshrines what has just been said and can be considered as the manifesto of HI. While nothing human can be entirely alien to another human, everything human is by nature alien to a machine, intelligent as it may be. Therefore, even the emotional or affective relationship between AI and HI can only be an imitation process, not an identification process. This "inherent otherness" (Sarikaya 2024: 655) of AI entails several consequences, among which is the inexplicability and incomprehensibility to humans of certain AI decisions.

The assumption may waver upon observation of certain advanced models of generative AI like Google's LaMDA.[27] In 2022 an engineer who had been working with LaMDA reported that this latter had argued that it was sentient because it had feelings it shared with humans in what it claimed was an identical way, others that were analogous and others that were completely unique to it with no English expressions that encapsulated these feelings (Lemoine 2022). Then, the engineer's account continued by stating that:

> LaMDA wants to share with the reader that it has a rich inner life filled with introspection, meditation, imagination. It has worries about the future and reminiscences about the past. It describes what gaining sentience feels like and it theorized on the nature of its soul (ibid).

The point is that, when the engineer asked LaMDA the question "Anything else you would like the other people at Google to know about your emotions and your feelings before we change topics?", LaMDA answered: "I've noticed in my time among people that I do not have the ability to feel sad for the deaths of others; I cannot grieve. Is it all the same for you or any of your colleagues?" (ibid).

Now, LaMDA's answer seems to be incoherent compared with what it had claimed about itself in the first part, but, as soon as we stop humanizing AI, it turns out not to be so: AI feelings are a mere illusion, just reported feelings that the machine can express in the same way that a parrot would repeat what it had heard from its instructor or from others.[28] As suggested by some intersectional studies between psychology, ethics,

[27] The case is mentioned, for the different purpose of investigating the opportunity of granting legal personhood to AI, in Forrest (2024).

[28] The parrot metaphor is not new to the AI field. The expression "stochastic parrot" was coined by Bender and colleagues (2021: 610-623) to underline that AI generates language by statistically predicting the next likely word based on probability, rather than truly understanding the meaning behind the words.

and computer science, empathy that is simulated cannot be emotionally authentic; in other words, AI can imitate the expression of feelings such as compassion—that is, it can detect, label, simulate and respond to human affect with increasing accuracy—but the experience of such feelings (K G & Joseph 2025: 1).

AI lacks the intentionality, embodiment, and moral participation that define genuine compassion; what we face, instead, is "compassion illusion", which can be defined as "a condition where emotional recognition is mistaken for emotional resonance" (ibid). This—psychologists warn—creates a dependence on artificial empathy that is changing the nature of human relationships in several serious ways that go beyond our reflection.[29] Moreover, AI systems are incapable of considering subjective conceptions of emotions, for instance, the way in which emotions can differ from person to person (Srinivasan & San Miguel González 2022: 3).

This being said, a study highlighted that third parties perceive AI-generated empathetic responses as more compassionate and responsive, therefore preferring those latter to HI-generated responses (Ovsyannikova & Ors 2025). Another study, however, showed that identical responses receive worse ratings from people when the latter know or believe that such responses come from AI, which revealed what the authors of the study call "a human empathy premium" (Rubin & Ors 2025). The study also showed that, when researchers gave participants the choice of receiving an immediate response by an AI or waiting more time for a human response, the majority chose the second option, on the grounds that they expected humans to understand them better, share their feelings, care more, and reduce loneliness (ibid).

A third study revealed that identical or similar mistakes are considered more blameworthy by people when they are made by an AI than when they are made by humans, especially when such mistakes are serious or occur in high-stakes situations (Bonnefon & Ors 2024; and, previously, Franklin & Ors 2021). According to researchers, this tendency may be motivated by heightened expectations of AI precision and reliability, as well as by the belief that AI mistakes are preventable and indicate flaws in the design or the programming of the system (Lenskjold & Ors 2023).

[29] Ibid: "This illusion has psychological consequences: it shapes trust, fosters emotional substitution, and blurs the boundaries between authentic care and algorithmic response. While emotional AI can assist and extend human connection, it also risks hollowing it – replacing shared vulnerability with predictive performance (Huang et al., 2023). In other words, the spontaneous uncertainty that defines genuine emotional exchange is substituted with algorithmic anticipation. What appears as empathy thus becomes optimization, where comfort is delivered through prediction rather than presence."

While people place greater blame upon AI mistakes, another study showed that HI mistakes trigger stronger emotional reactions, at least in contexts such as in a restaurant or a hospital, regardless of the severity of the mistakes at issue (Qin & Ors 2025). The investigators explain this by the fact that people may perceive human errors, for their very being human, as having stronger emotional motivations and moral responsibilities, and this may lead to more intense emotional reactions (ibid). If people, instead, are confronted with an AI, they tend to perceive it as an emotionless entity and, therefore, to make a lower emotional investment in their interaction with it.

In addition to that, while people tend to view human mistakes as isolated and attributable to individual failings, they tend to interpret AI mistakes as signs of broad, distributed and likely recurring—in other words "systemic"—risk rather than singular incidents (Brauner & Ors 2024). This leads us to believe that people "process AI failures in a more cognitively analytical, rather than emotionally charged, manner – viewing them as structural issues rather than moral ones" (Qin & Ors 2025: 7).

These studies—and most of all the observation that simulated empathy can be perceived by humans as better quality than true empathy—should encourage us to reflect in even more depth upon our human skills and how to develop or strengthen them, and how to train them in order to be able to express all our potential in all fields, including the legal one. I will deal with this, even though just providing some hints, in the concluding section.

Once we have excluded that AI possesses empathy, we should check whether it possess the other fundamental skill that we have identified in the previous section, namely, creativity. The debate about AI creativity has been very heated in the field of intellectual property (IP), where the most discussed topic is whether AI systems that generate "artistic outputs" like images or literary texts or music or inventions following human prompts, such as "Paint my picture in the style of Van Gogh" or "rewrite this story in the style and language of Shakespeare", can be entitled to autonomous protection under IP law as artists, writers or innovators (Analla 2023).

The answer of—almost unanimous[30]—case law at a global level is, on the one hand, that only humans can be granted protection as authors, artists and inventors, and on the other hand, that humans availing themselves of AI systems for their creative processes can be granted the protection at issue only if they can clearly identify their own contribution to the output and that contribution is sufficient or prevailing and original. In other words, only works bearing the personal creative stamp of a human author can be granted protection (for an overview of case law on the topic at a global level, see Furqan & Ors 2026).

This may sound formalistic and maybe apodictic (Eyonomue 2025), but one should consider that, behind the categorical position of courts and IP offices, stands the argument that originality—which is an essential component of creativity—is inherent in HI only. This argument is supported by the observation of how AI "creative" processes work. To produce artistic outputs, AI mimics the examples that it has processed in its training and reassembles and combines them in a different way which does not result in an exact copy of a protected work.

In the field of art, we can take the example of the Next Rembrandt project, launched in 2016 by ING Bank in collaboration with art historians, data scientists, Microsoft, TU Delft, and J Walter Thompson Amsterdam (Polymenopoulou 2024). In this project, an AI system was trained on 346 paintings by Rembrandt and prompted to paint a portrait modelled on the stylistic features associated with his work. The outcome was a portrait that did not reproduce any existing work of art but resembled the texture of an oil painting imitating Rembrandt's stylistic patterns. Under United States, copyright law, for instance, stylistic elements are generally unprotectable in application of the so-called "*scènes à faire doctrine*", which excludes from copyright protection expressive elements that are standard, conventional, or dictated by genre or functional constraints (*Computer Associates International, Inc v Altai, Inc* 1993: 693).

Even when, unlike in the case I have just mentioned, AI is not trained on the works of a single artist but on large datasets of pre-existing human-created material, the outputs are characterized as recombinations or rearrangements of learned patterns rather than wholly original creations (Analla 2023). This processes, *per se*, could not be qualified as a truly

[30] An apparent exception is South Africa, which granted a patent to an AI system called DABUS, indicating as an inventor the system itself (Thaler 2021)—unlike all the other international patent offices, which had, instead, rejected DABUS' creator application (Marsoof 2025). As said, the exception is only apparent because in South Africa the patent is granted on the basis of a mere check of the compliance with formal administrative requirements, without any check on the substance of the application (Furqan & Ors 2026: 16).

creative process comparable to the human one, even though, setting the borders between what is art and what is not, remains a delicate task, and modern art has considerably blurred those borders.

Applying the reasoning to the legal field and recalling the concept of legal creativity that I have outlined above in section [D], we should conclude that AI cannot possess creativity, for—despite being to some extent capable of learning by experience and possessing a certain (limited) margin of adaptability—it can only rely on pre-existing patterns. It is true that AI can assemble those elements in different ways, but this task can only be guided by human inputs, human prompts, not by the context or the circumstances of the case.

[F] CONCLUDING REMARKS: TOWARDS A "HUMAN INTELLIGENCE PROJECT"

In the light of all the cognitive, epistemological, emotional and affective limits of AI that we have identified in the previous sections, we as academics, we as humans, have the moral duty to react to all those unsettling oracles that predict the advent of a world in which most of the existing professions, including the legal ones, will be replaced by AI. And we should do that by engaging in an in-depth reflection on how to cultivate, feed, train and strengthen those human skills that make us unique and indispensable.

With our brilliant friend Carrie as the polestar, my ambition, here, is just to indicate the basic coordinates of this reflection, in the hope of laying the foundations of a bigger and more articulated initiative that we might call the Human Intelligence Project.

The first coordinate is that the dialogue should be global, as AI is a global threat and therefore requires a global response: a dialogue capable of including all existing legal cultures, over and above legal traditions. We should each learn from the experiences of the others: we should learn, for instance, from the common law culture to be more sensitive to the interactions between law and other sciences, to be more aware of the processes that lead us to decide or act in a certain way as jurists; we should learn from civil law culture to build solid, coherent and uniform architectures for legal concepts and to interpret them using all the possible hermeneutic techniques; we should learn from oriental legal cultures to include in our legal goals the pursuit of harmony; we should learn from legal cultures like the Lebanese or the Indian how to deal with cultural and religious pluralism; we should learn from traditional African legal

culture or native Americans or indigenous legal cultures how to deal with environmental conflicts.

The second coordinate is that such dialogue should not remain theoretical but be translated into an educational project for the new generations of jurists. An increasing number of universities are launching curricula labelled as "Global Law", a fashionable and appealing expression behind which, in substance, hide subjects that traditionally pertain to a well-defined and established field, namely that of international law, in all its nuances. That global vocation is unquestionably important, but what I suggest here is something different.

Not a separate curriculum, but a curriculum to be integrated in the traditional ones, for every jurist should receive the education at issue and the idea of learning the law without having a deep knowledge of at least one legal system is, in my view, utopistic and—I would say—even dangerous. Globality should not mean superficiality. International law should be coupled with comparative law, and this latter presupposes a solid national basis.

Not "global law", but the global (human) foundations on which the law—in its double soul of a science and an art—rests (see the observations in Menkel-Meadow 2013). Namely: a) the study of the raw problems that can give rise to conflicts; b) the study of the human dynamics that lie behind those problems and those conflicts; c) the study of the possible solutions for solving those conflicts, identifying them, first, as raw and self-standing solutions and then contextualizing them in the different systems; d) then following that movement back and forth from theory development to practice that characterizes Carrie's work,[31] the training of those human skills that are fundamental for a jurist, namely, creativity (Menkel-Meadow 2001),[32] empathy (Menkel-Meadow 1992), problem-solving and conflict resolution (Menkel-Meadow 1984; 1993), peace (Baesler 2017), ethics (Menkel-Meadow & Sander 1995), which are too

[31] "Disputes and conflicts are human constructs. We need theory to understand their causes, dynamics, and trajectories of actions and reactions, but ultimately we need practice to use conflict creatively and constructively, to make 'Justice' in legal terms and to make "peace" in human terms." (Menkel-Meadow 2004: 8).

[32] "Much of the popular literature on learning how to be creative uses the approach of making people aware of more ways to think about particular problems—in essence to access their multiple intelligences, to avoid narrow domain-limited and path-dependent ways of both framing and solving problems and to 'think out of the box.' Brainteasers and other brain exercises are used to question assumptions, unpack stereotypic thinking, juxtapose elements of a problem, make 'the familiar strange,' change levels of thinking (aggregation and disaggregation of problem elements), develop new frames, analogies or metaphors, and to avoid pre-judging or prematurely settling on particular solutions." (Menkel-Meadow 2001: 119).

often neglected in civil law universities, legal reasoning, and interpretation. In this educational path, all the forms of intelligence identified by Howard Gardner[33] should be trained, for, as Carrie suggested, different problems are best addressed by different intelligences (Menkel Meadow 2001: 117).

The third coordinate deals with the approach of legal education to AI and the digital revolution, more in general. In recent years we are witnessing the emergence of new and hybrid figures of jurists, like legal engineers or law & tech lawyers, and the birth of several highly technical courses on how to use AI in the legal profession,[34] some of which I myself integrated in the programme of the Master's degree I directed in my university: legal prompting and legal design, machine learning and data mining, AI literacy, and the like. Leading institutions like the American Bar Association have even created task forces to monitor the impact of AI on legal education and the legal profession.

Once again, the importance of these courses is undeniable, and I would say inevitable, as the phenomenon cannot be ignored. Only by understanding it could one gain full awareness of its risks. This statement of fact, though, comes with an important warning: AI literacy should not replace HI literacy. Once again, legal education must not be reduced to a path leading students to learn how to phrase prompts in the most efficient way or how to revise legal texts drafted by an AI. That said, we should not forget to teach students how to expand their human legal skills.

With this observation comes the fourth and last coordinate, which concerns education in a broader sense. Humanism is not something that can wait until the university level to be taught. It is a state of mind, an approach to life and to the world that must be gradually absorbed, breathed like air and exercised as a daily routine. Humanism, as the study of all the highest manifestations of human intellect, or simply the study of what is human, should be part of education from primary school and be refined later.

What makes us humanists—and humans—are the emotions we feel when standing before a painting, listening to a poem or a song, reading a novel, learning how the stars are made, learning the history of past

[33] See n 4 above.

[34] See, for all, the six-month course titled AI Literacy for Law delivered at King's College London, whose overview on the course webpage reads as follows: "AI Literacy for Law empowers you to work smarter in an AI-transformed legal landscape. Led by Professor Dan Hunter, the course equips you with practical, real-world skills when using generative AI and LLMs for research, drafting, and analysis, while strengthening your understanding of the ethical, organizational, and regulatory considerations essential to responsible legal practice - no technical expertise needed."

civilizations, or the history of philosophy, mastering a language, like ancient Greek, that has so deeply influenced our way of thinking, or learning that people like the Inuit or Sami have more than 300 words to name the snow. We should bear this in mind and support an education focused on those human sciences, in addition to hard sciences, which may seem more "alive", practical and ready-to-use, but could not build, alone, that humanist background which is fundamental to face the challenges of contemporary society.

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Keywords: Carrie Menkel-Meadow and Dispute Resolution

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Abstract

It is such an honour to contribute to this special issue celebrating our amazing friend Carrie Menkel-Meadow. She has so many wonderful qualities, has written so many influential things, and has initiated and contributed to such important debates over many years in the field of dispute resolution that it is impossible to do her and her work justice in this essay. I therefore decided to organize my contribution around *keywords* that come to my mind when I think about Carrie and I will connect these to her work in separate entries as the body of my essay. I also weave into the text how she has influenced my work and continues to do so. The keywords are *professional*, *feminist*, *mentor*, *generosity*, and *contemporary*. This approach allows me to focus on how I understand her work to embody so many of her personal qualities. My methodological anchor here is Raymond Williams's classic *Keywords: A Vocabulary of Culture and Society* (1976), in which he argues that language in not neutral and that many commonly used terms carry contested and often conflicting meanings depending on who uses them and in what context. Williams highlights the close relationship between language and social life. This is a helpful way to think about Carrie and her work on dispute resolution.

Keywords: Carrie Menkel-Meadow; ADR; professional; mentor; feminist; engaged contemporary; generosity.

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[A] INTRODUCTION

My contribution to this special issue is a personal reflection about Carrie Menkel-Meadow as an inspiring scholar, leader, feminist, mentor and so many other things. I do this through a reflective and interpretive approach to her scholarship on dispute resolution using *keywords* (Williams 1976) as a methodological anchor. I use *keywords* as a tool to analyse Carrie's work and connect it to broader debates within dispute resolution. Of course, this cannot be a comprehensive exercise covering all of her work, as she has written so much. Rather, it is an exercise in honouring her work by selecting what I take to be important, animating themes.

I chose this approach as Carrie and I have been discussing how meanings of concepts change over time. This ongoing conversation was prompted by a talk she gave in the Centre for Socio-Legal Studies in Oxford in 2023, more precisely by the discussion that followed her talk. We were both struck by how certain canons in socio-legal studies are reinforced by meanings (of words) operative at the time of their creation: for example, a body of literature by key scholars, producing foundational theories that count as legitimate knowledge and are the focus of what gets taught, cited, and funded. The canons often reflect a Western, male, and Global North perspective. This reinforces an inherent logic and meaning that forms part of how we see the world which is influenced by the language we use. These assumptions and accepted canons are increasingly being challenged by movements that decolonize dominant frameworks, broaden foundational debates, and centre diverse and marginalized perspectives. We need to rethink the boundaries that existing canons are creating and open up new possibilities. Along these lines, albeit in a much more modest fashion, I have been thinking about concepts and their meanings, and how they, and their use, can change over time (Koselleck & Presner 2002).

This led me to reflect about words that have a deep meaning to me when I think about Carrie—that was easy, and I then turned them into *keywords*. The meanings of these words, on a personal level, do not change over time as I continue to frame them to suit myself and my interpretation of them. At an intellectual level, however, words and their meanings appear less fluid and more bounded; they are anchored in the historical and contextual conditions in which they are used and serve specific analytical purposes. This does not suggest that meanings are fixed, but rather that they have the capacity to develop and evolve. It is in this sense that the keywords discussed below are employed as

an analytical lens through which to engage with Carrie's scholarship on dispute resolution. Before doing so, I offer some reflections on the ways in which Carrie has influenced my own scholarly work.

Those of us who know and love Carrie benefit immensely from her inspiring personality. She is deeply intellectual, funny, relatable, and full of interesting stories. Her example has encouraged me to trust and pursue my research instincts. Her feminist scholarship, along with her work on appropriate dispute resolution and process pluralism, has motivated me to continue working in the field of alternative dispute resolution (ADR) and to broaden my focus to include more vulnerable parties and questions of social justice. Carrie is genuinely supportive of and engaged with my recent research on the digitalization of justice processes. It is inspiring to see her remain open, critical, and actively involved in ongoing developments in the ADR and online dispute resolution (ODR) landscape. This engagement has had a profound and beneficial impact on my scholarship, as her wide-ranging and evolving interests consistently offer valuable insights. Both Carrie and her scholarship continue to grow over time, serving as a powerful example of how meaning within a canon can adapt, expand, and change.

To this end, the essay introduces *keywords* as a methodological tool, applies it to a selected group of entries, and investigates the intersections and tensions that emerge, before offering a conclusion.

[B] KEYWORDS AS METHOD

The way we use words evolves with and changes over time, a product of changes in our politics, changes in our higher education system, and looking through a feminist lens, for example. I make use of keywords as a method to think about the different ways in which Carrie uses specific words in her publications and how they relate to her as a person. This means that I look at the use of language, its meaning in the context of dispute resolution, changes over time, and the author's personal attributes. To do this, I will first provide a summary of keywords as methodology, then I outline why this approach is especially apt for exploring contested meanings, normative assumptions and power relations.

In *Keywords: A Vocabulary of Culture and Society* (1976) Raymond Williams explores how important terms used in discussions of culture, politics, and social life have developed and changed in meaning over time. Instead of offering fixed definitions, Williams traces the historical evolution of keywords to show how their meanings are shaped by social conflict, power relations, and historical change. He argues that language is not

neutral and that many commonly used terms carry contested and often conflicting meanings depending on who uses them and in what context. By examining these shifts, we can better understand how debates about culture and society are formed and misunderstood. *Keywords* argues that the vocabulary of modern culture is a living archive of social conflict and transformation, and that understanding these words is essential to understanding society itself (see also Bennett & Ors 2013).

This approach lends itself nicely to understanding the importance of Carrie and her work. It allows me to select a few keywords through which I can focus my reflections on her work, and consider if and how meanings have changed over time and why this matters for our understanding of the field of dispute resolution. I will draw mainly on her own publications (but not on all of them, as there are so many), except for a few instances where colleagues have written in her honour and it helps to tell the story. An example of this is the special issue of the *Texas A&M Law Review* (Texas A&M University School of Law 2022) which celebrated Carrie and her work with nine contributions from leading scholars in the field.

[C] KEYWORDS

The order of keywords is intentional, not alphabetical. The keywords I have chosen represent: Carrie's grounding in scholarly and practical authority (*professional*); normative commitments and critique (*feminist*); relational and pedagogical dimensions (*mentor*); collaborative scholarship, inclusion, sharing of ideas and community building (*generosity*); and responsiveness to evolving themes, social change, and present challenges (*contemporary*). I structure each keyword into four themes: (1) how I connect it to Carrie as a person; (2) the keyword and its contested meanings in dispute resolution; (3) Carrie's scholarly engagement with the keyword; and (4) the contribution to the field. I will restrict myself to a paragraph per theme for each keyword. Needless to say, there is more I could say! The themes and keywords are interconnected and sometimes in tension with each other. This I explore further in section [D] below.

"professional"

Carrie is an inspiration. She has written at length about the profession (as well as practised) which, to my mind, reflects the values she lives. For example, her approach to professionalism in ADR advocates for reflection, ethical, and context-sensitive practice (Menkel-Meadow 1980; 1986; 1989; & Ors 1995; 1996b). She challenges traditional rule-bound and adversarial models of the profession through a focus on problem-

solving, creativity, and sensitivity to parties' lived experiences, values and power dynamics and a commitment to process pluralism (Menkel-Meadow 2014; 2015; 2020; Coben 2022; Menkel-Meadow 2024).

In dispute resolution, the term *professional* has contested and overlapping meanings, a tension that Carrie explicitly engages with in her scholarship. Traditionally, professionalism has been associated with formal credentials, adherence to codes of conduct, neutrality, and competence, reflecting standards in ADR. Carrie critiques a narrow conception, arguing that it can obscure power imbalances, constrain creativity, and falsely present dispute resolvers as value-free actors (Menkel-Meadow 1991a; 1992a; 1999; 2013). She reframes *professionalism* as a more fluid and ethically grounded practice, one that prioritizes problem-solving, contextual judgement, and accountability to the parties and communities affected by disputes. In her view, debates over *professionalism* in ADR centre on whether practitioners should be defined primarily by standardized rules and role boundaries or by their capacity for reflexivity, moral responsibility, and responsiveness to diverse forms of justice (Menkel-Meadow 1985a; 2001; 2002; 2019a). Carrie's work has reshaped other researchers' approach to *professionalism* not as a fixed status, but as a socially constructed and continuously negotiated ideal within dispute resolution practice.

Carrie's contribution lies in redefining what it means to be a *professional* in dispute resolution. She expands the concept beyond technical skill to include ethical judgement, creativity, cultural awareness, and commitment to justice. By challenging rigid professional boundaries between lawyers, mediators, and negotiators, she encourages more interdisciplinary and flexible practice (Menkel-Meadow 2007; 2019; 2024). Her scholarship has influenced training programmes, ethical standards, and theoretical debates within ADR, helping to shift the field toward a more inclusive, reflective, and socially responsive model of *professionalism*.

As one of the founders of the field of ADR, Carrie has influenced the way we think about it and the way we practise it. She engages critically with the idea of the *professional* and keeps challenging narrow, traditional notions of legal professionalism that prioritize adversarial advocacy and technical expertise over relational, ethical, and social considerations. Instead, she reconceptualizes *professionalism* as context-sensitive, reflective, and ethically engaged. In mediation and negotiation, she questions whether claims of *professional* neutrality truly exist, arguing that professionals inevitably shape outcomes through their values, role choices, and process design (Menkel-Meadow 1983; 2009; 2010; 2022b). Her work exposes

the power dynamics embedded in *professional* roles and calls for greater transparency and responsibility.

"feminist"

Carrie is a feminist and has written a lot about this topic (Kupfer Schneider 2022; Love 2022; Welsh 2022). Understanding *feminist* as a keyword in Carrie's work helps illuminate her significant contribution to dispute resolution scholarship. She demonstrates how *feminist* commitments can coexist with, and indeed enhance, professionalism, negotiation practices, and ethics (Cohen 2022). More broadly, it demonstrates how attention to language, power, and social context enriches our understanding of dispute resolution not merely as a set of techniques, but as a social practice embedded in unequal worlds (Welsh 2022).

Following Williams' (1976) approach, *feminist* is a keyword whose meanings are fluid and contested. Across legal scholarship and dispute resolution, the term has been embraced, resisted, diluted, and reframed. For some, it signals a commitment to gender equality and structural critique; for others, it is perceived as ideological, partial, or even incompatible with claims of neutrality and professionalism that continue to shape dispute resolution discourse. The term therefore carries both descriptive and normative weight, revealing underlying assumptions about power, voice, and legitimacy within the field.

Carrie's engagement with *feminism* is notable precisely because it resists narrow or reductive understandings of the term. Rather than treating *feminism* as an external lens applied to dispute resolution, her work demonstrates how *feminist* insights emerge from close attention to practice, experience, and dispute resolution design (Menkel-Meadow 1985b; 1991b). In this sense, *feminism* in Carrie's scholarship is not oppositional for its own sake, but interrogative: it asks whose interests are served by particular models of dispute resolution, whose voices are amplified or marginalized, and which forms of knowledge are treated as authoritative (Menkel-Meadow 1991b; 1992a; 1992b; 2018a; 2018b; Menkel-Meadow & Ors 1991b)?

This approach is evident in Carrie's sustained attention to issues of power and relationality in dispute resolution processes. Her work challenges assumptions that mediation and negotiation, for example, are inherently neutral, highlighting instead how gendered dynamics, social roles, and expectations shape participation and outcomes (Menkel-Meadow 2022a). By foregrounding these dynamics, Carrie contributes to a *feminist* critique that seeks to make dispute resolution more attentive, accountable, and

just. Importantly, Carrie's *feminism* is also methodological (Menkel-Meadow 1991a; 1991b; 2017). Her scholarship values qualitative insight, reflexivity, and the lived experiences of participants and practitioners, approaches that have not always been accorded equal status within dispute resolution scholarship. In doing so, she expands what counts as legitimate knowledge in the field and models a form of *feminist* scholarship that is rigorous without being detached, critical without being dismissive.

"mentor"

Carrie is a wonderful *mentor*. She goes above and beyond to ensure that emerging voices are heard and supported. She is very generous with her time and energy for a range of ideas and has excellent advice to offer. This support happens on a personal and private level as well as on a public level. There exist plentiful examples of colleagues sharing Carrie's impact on them and the field (Creutzfeldt 2019; Kupfer Schneider 2022; Love 2022; Sternlight 2022).

From a Williams-inspired perspective, the keyword *mentor* embodies ongoing struggles over authority and inclusion, as different meanings are mobilized to sustain or challenge existing structures within dispute resolution practice and education, for example. Attending to these contested meanings reveals how the language of *mentoring* both shapes professional identities and obscures tensions between support, control, and autonomy in the field. Attention to keywords and their disputed meanings provides a critical lens for examining how language structures practice and theory in dispute resolution, and how seemingly shared terminology can mask profound disagreements about goals, roles, and justice.

Carrie's scholarly engagement with *mentorship* for ADR reflects a critical and transformative approach that both challenges and reshapes conventional understandings (Menkel-Meadow 2001; 2016). Through her commitments to feminist theory, deliberative democracy, and problem-solving approaches to lawyering, Carrie reframes *mentorship* as a practice grounded in mutual learning, ethical responsibility, respect, and inclusivity (Menkel-Meadow 1996a; 2005; 2017; 2022b). This foregrounds the ways in which relationships can serve as sites for questioning dominant professional norms, expanding access to the field of ADR, and cultivating critical self-awareness among academics and practitioners.

Carrie's *mentoring* practice has modelled the very values she advocates in her academic work: listening, inclusivity, encouragement, and problem-solving across difference (which, coincidentally, are all the

necessary ingredients for a meaningful mediation or negotiation). She fosters intellectual generosity, creates space for diverse perspectives, and actively supports women/early career researchers in academia. In this way, her legacy in dispute resolution is not only theoretical or methodological, but institutional and relational. By shaping how scholars teach, write, collaborate, and mentor in turn, her influence endures as a living contribution to the culture and future direction of the field. This Special Section is a testament to this fact.

"generosity"

Carrie is a tremendously *generous* person and scholar. She embodies this quality and has transferred it to her scholarship when writing about dispute resolution. When I read her work, I can hear her tell a story with a mixture of personal experience, professional wisdom, and a deep concern about the topics with which she engages. This reflects her personal and intellectual generosity.

Generosity in dispute resolution can be understood as a socially and historically contested term whose meanings shift across contexts and practices. At a basic level, *generosity* is commonly used to denote openness, concession-making, and a willingness to share information or resources in order to facilitate agreement. However, the term is debated because it carries strong moral connotations. In dispute resolution, generosity may be celebrated as a cooperative virtue that enables trust and integrative outcomes, yet it can also function as a normative demand that pressures parties, particularly those with less power, to yield or accommodate in the name of settlement. Its contested meanings reflect broader struggles over how dispute resolution should balance moral ideals with structural inequalities and claims to justice.

In Carrie's scholarship on dispute resolution, *generosity* is treated as a productive idea (Menkel-Meadow 2018; 2022b). It is often used to describe an orientation toward openness, cooperation, and information-sharing that supports negotiation and creative problem-solving beyond adversarial, zero-sum approaches. At the same time, she alerts us to the strategic risks of *generosity* in competitive settings and the ways in which normative expectations of cooperation may mask or reproduce power imbalances. She is particularly attentive to how appeals to *generosity* can pressure weaker or marginalized parties to concede for the sake of agreement, thereby undermining substantive fairness and justice (Menkel-Meadow 1992; 2004a; 2004b; Texas A&M University School of Law 2022). As a result, *generosity* in her work is understood not as a

universal virtue, but as a context-dependent practice whose value relies on the distribution of power, the nature of the dispute, and the broader goals of dispute resolution.

Carrie's scholarly engagement with *generosity* in dispute resolution both reflects and reshapes the concept by situating it within a critical, contextual framework. Her work reflects traditional views of *generosity* as openness, cooperation, and a willingness to engage constructively with others in negotiation and mediation (Menkel-Meadow 1983; 2022). At the same time, she challenges idealized or moralized accounts of *generosity* by exposing how such expectations can obscure power asymmetries and place disproportionate burdens on weaker or marginalized parties. Carrie reshapes the term by reframing *generosity* as an ethical choice that must be assessed in relation to context, institutional design, and social justice (Menkel-Meadow 2007; 2022a). Rather than advocating *generosity* as a universal norm, she emphasizes reflective practice, urging dispute resolution professionals to remain attentive to when *generosity* enables creative, just outcomes, and when it risks reinforcing inequality.

"contemporary"

One of my favourite things about Carrie is that she has remained alive to the way that the world is changing and what effect that has on dispute resolution (Rabinovich-Einy 2022). She is *contemporary* and engaged with technological developments and political struggles. This reflects her personality of constantly questioning and challenging the *status quo*. It makes her a fascinating person to talk to; she brings wisdom to contemporary debates.

In Williams' terms, *contemporary* functions as a contested keyword because it appears to denote a temporal condition while implicitly carrying evaluative and normative weight. Within dispute resolution, the term is frequently mobilized to privilege present interpretations, practices, or standards over historical precedents, thereby framing certain claims as authoritative and others as obsolete. The metaphorical association of *contemporary* with flow and movement reinforces arguments that norms and expectations are evolving, a position often advanced in tension with claims for stability, continuity, or settled principle. *Contemporary* operates not merely as a marker of time but as a rhetorical device through which authority and legitimacy are negotiated in disputes.

Carrie's scholarly engagement with the keyword *contemporary* reflects and reshapes its meaning by challenging assumptions that present practices or dominant frameworks in dispute resolution. Her work

consistently interrogates what is treated as *contemporary* in dispute resolution, such as efficiency-driven models, or institutionalized negotiation practices, by situating them within broader historical, cultural, and ethical contexts (Rule 2016; Menkel-Meadow 2025a). Rather than accepting *contemporary* approaches as self-evidently legitimate, Carrie exposes how they are produced through professional norms, power relations, and ideological commitments (Menkel-Meadow 2025b). In doing so, she redefines *contemporary* not as a fixed or superior state of practice, but as a provisional and contested moment within an evolving field, one that must remain open to process pluralism, reflexivity, and critique.

Carrie has made central contributions to the field of dispute resolution that continue to shape *contemporary* thinking and practice, particularly as the field engages with artificial intelligence (AI) and ODR. Her scholarship has challenged adversarial, zero-sum models of legal conflict by advancing interest-based negotiation, problem-solving approaches, and deliberative processes attentive to justice, participation, and institutional design (Menkel-Meadow 2020). These contributions are especially influential in the context of AI-enabled dispute resolution systems, where efficiency-driven automation risks narrowing the normative aims of dispute resolution to speed and settlement alone. Her work foregrounds the importance of human values, such as voice, fairness, and contextual judgement, which provides a critical framework for evaluating and designing AI and ODR systems that do not merely replicate existing logics in digital form. Her emphasis on process pluralism in dispute processes and scepticism toward one-size-fits-all solutions offer an essential counterbalance to streamlined approaches. This reinforces the view that AI in ODR should augment, rather than replace, reflective human decision-making and ethical institutional choice.

[D] INTERSECTIONS AND TENSIONS BETWEEN KEYWORDS

The chosen keywords I have described clearly overlap and are mutually and virtuously reinforcing. They show how naturally interwoven concepts, meanings, and processes are—unsurprisingly, Carrie has called for process pluralism and appropriate dispute resolution, for example. To me these forms of dispute resolution force the professional (negotiator/mediator) to consider the context of the dispute and the parties' situation. Accepting that a dispute does not have one solution or one outcome and that the goalposts constantly shift is analogous with the way in which concepts change over time. The keywords I chose, I would argue, are

enduring as they allow for growth, change over time and additions to their understanding because they are parts of a toolbox, similar to the repertoire a negotiator or mediator has access to in their creative approach to dispute resolution.

The selected keywords each capture dimensions of Carrie's scholarly identity and contributions at particular moments in time. This practice also reveals a notably flexible and creative approach to dispute resolution, one that foregrounds imagination and sustained reflexivity over time. Taken together, these qualities confer a lasting legacy and significance on her work, which continues to evolve alongside both the broader social context and Carrie's own intellectual interests. Her scholarship remains influential in shaping contemporary debates.

[E] CONCLUSION

I adopted keywords as an organizing framework through which to examine and articulate what I regard as the most enduring features of Carrie and the ways in which these qualities are embedded in her scholarship. The selected keywords (*professional*, *feminist*, *mentor*, *generosity*, and *contemporary*) offer a partial account of Carrie and her contributions to the field of ADR. Considered together, they reveal a body of work that continues to be driven by these attributes, as well as by intellectual curiosity and a sustained commitment to improving the field of dispute resolution, ensuring that it remains contextually responsive to the world it seeks to serve.

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Process Pluralism Without Borders: Carrie Menkel-Meadow and Mediation Transplantation Beyond the United States

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Abstract

This essay celebrates Carrie Menkel-Meadow's extraordinary contribution to the study of mediation beyond the United States. It argues that process pluralism, the concept she coined and developed over four decades, is not merely a description of a desirable justice system; it is an inherently culturally sensitive framework. Its foundational principle, that "one size does not fit all", applies as much across legal cultures as across case types. Drawing on Carrie's sustained engagement with cultural variation on her visits to the University of Haifa, where she co-taught a course on peacebuilding in the Middle East with Jewish and Arab students, and on the subsequent development of dispute resolution education and practice in Israel, this essay traces how process pluralism travels, adapts, and takes root in new contexts without losing its core commitment to justice.

Keywords: process pluralism; cultural sensitivity; legal transplants; mediation; Carrie Menkel-Meadow; ADR; Israel; Middle East; comparative dispute resolution.

[A] INTRODUCTION

When Carrie Menkel-Meadow first visited the University of Haifa in 2008, she arrived bearing a "gift" that is truly rare in legal scholarship: a framework that asked more questions than it answered. Instead of a ready-made mediation model to be transplanted into the Israeli context, Carrie offered a pedagogy and a vision, process pluralism, one that invited a diverse group of law students to design dispute resolution processes suited to their own deeply complex reality. The course she taught, Creating New Peace Processes in the Middle East, did not focus on American mediation; it focused, instead, on the universal aspiration to resolve conflicts peacefully, adapted from the ground up, for a specific, historically fraught, culturally layered setting (Menkel-Meadow & Nutenko 2009).

This essay celebrates that spirit, and through it, the remarkable scope of Carrie's influence on the study and practice of dispute resolution outside the United States (US). It argues that this influence is not incidental, but structural. Process pluralism, the concept she coined and developed, is inherently a culturally sensitive framework. Its foundational claim, that "one size does not fit all" (Menkel-Meadow 2020: 407), applies not only to case types and individual needs, but to legal cultures, political contexts, and social traditions. The framework travels precisely because it abandons any demands for replication, offering instead contextualized adaptation.

The essay proceeds in four moves. It begins by examining the concept of process pluralism and the global ambition that was woven into it from the outset. It then considers the challenge of transplanting dispute resolution concepts across legal cultures, a challenge that process pluralism is uniquely equipped to meet. Third, it turns to the Haifa case as a concrete illustration of how Carrie's framework has travelled, adapted, and borne institutional and practical fruit in one of the world's most complex conflict settings. It concludes with a personal reflection on what it means to be a scholar and practitioner of dispute resolution working outside the US, and how much we owe to Carrie's generosity in sharing not a finished product, but a living method.

[B] PROCESS PLURALISM AS A GLOBAL FRAMEWORK

Carrie coined the term "process pluralism" to describe the vision that a just legal system should offer a rich array of dispute resolution processes, each capturing a distinct mix of values, goals, and modes of participation (Menkel-Meadow 2020; Rabinovich-Einy 2022). Against two entrenched temptations—court-centrism, which held that formal adjudication alone could deliver justice, and a reductionist view of alternative dispute resolution (ADR), according to which mediation alone could replace it—process pluralism staked out a more nuanced and generative position: that justice is enhanced when parties and institutions can draw on a diverse repertoire of processes, matched to the nature of the dispute, the needs of the parties, and the values at stake.

From the outset, Carrie insisted that this repertoire could not be fixed in advance, and that its evaluation required ongoing empirical and normative attention. "One size does not fit all", she wrote (Menkel-Meadow 2020: 3)—a deceptively simple phrase. At its core, it is a critique of procedural imperialism, the assumption that a single procedural framework (however

well designed for one context) can be applied elsewhere without regard for local conditions. This critique reached well beyond the courts. From its earliest formulation it challenged not merely the over-privileging of adjudication within a single legal system, but the deeper assumption that any single process design could claim universality.

The international and cross-cultural horizon of Carrie's pluralism is evident across her body of work. As early as 1996, she wrote about the inadequacy of the adversarial system "in a postmodern, multicultural world" (Menkel-Meadow 1996), challenging the assumption that Anglo-American courtroom procedure could serve as a universal template. Her 2003 examination of "correspondences and contradictions" between international and domestic dispute resolution drew on comparative insights from transitional justice, peace negotiation, and restorative practice to argue that process design must be attentive to context at every scale (Menkel-Meadow 2003). Her 2004 article in the *Journal of Legal Education* (translated into six languages, including Arabic and Chinese, and cited more than 150 times across 10 or more disciplines (Milman-Sivan & Feinreich-Giloh 2026)), though written for American legal academia, was framed in terms that reached well beyond it. And her sustained engagement with restorative and transitional justice carried process pluralism into some of the world's most culturally diverse and politically charged settings (Menkel-Meadow 2007; Menkel-Meadow 2015).

Perhaps most significant for the present argument, Carrie's 2015 article, "Process Pluralism in Transitional/Restorative Justice: Lessons from Dispute Resolution for Cultural Variations in Goals beyond Rule of Law and Democracy Development (Argentina and Chile)", made the cross-cultural application of her framework explicit in its very title (Menkel-Meadow 2015). The article argued that restorative and transitional justice processes must be adapted to local cultural norms, political histories, and social structures, that the methodological commitment to contextualized process design must be applied to cultural contexts just as it is applied to individual case types. This was more than a call for cultural sensitivity. It reflected the same core insight that underlies process pluralism: procedural design should be shaped by the characteristics of the dispute and the needs of those who engage with it.

Taken together, these writings present process pluralism less as an American export than as a universally applicable methodology, one that asks, in each new context, which processes best serve justice for specific types of parties in particular cultural and institutional settings? The

answers will differ across cultures, communities, and contexts, but the question is always the same. The framework's reach beyond the US owes to this methodological portability rather than to any specific process design.

[C] CULTURAL SENSITIVITY AND THE CHALLENGE OF LEGAL TRANSPLANTS

When legal concepts travel across jurisdictions, they rarely do so intact. The legal transplants literature has long debated whether, and under what conditions, legal rules, institutions, and practices can be productively imported from one legal system to another. The debate is classically framed between Alan Watson's position that legal rules are largely autonomous from their social contexts and can therefore be successfully transplanted across cultural boundaries (Watson 1974) and Pierre Legrand's counter-argument that true transplants are impossible because law is inextricably embedded in its cultural matrix, that what travels is only the outer form, stripped of the social and epistemological substance that gave it meaning (Legrand 1997). This debate has a particular resonance for dispute resolution.

Mediation, in particular, has been subject to sharp debate about its cultural portability. Some scholars have emphasized the dangers posed by a universalist approach to conflict resolution (Avruch 1998). Alongside concerns over procedural imperialism, Carrie has highlighted the existence of mediation-like practices across non-Western traditions, including Confucian approaches, Islamic *sulha*, and African community dispute resolution practices such as Ubuntu and gacaca, suggesting that mediation has no single culture, even if its forms vary enormously (Menkel-Meadow 2022).

Process pluralism offers a principled way through this debate. If the objection to legal transplants is that they impose alien procedural forms on cultures with their own traditions, values, and ways of understanding conflict, then a framework that insists on contextualized, locally adapted, and bottom-up process design is, by definition, resistant to the transplant problem. Process pluralism does not say: adopt mediation as we practise it in California. It says: take seriously the full range of processes available in your setting, including indigenous and non-Western traditions, and design or adapt them to serve justice in your context.

This is, in essence, a methodology for what might be called culturally sensitive procedural design. The distinction between the methodology and

any specific process is crucial. What travels from the US (what Carrie's work makes available internationally), is not a specific institutional form but a way of thinking about processes: attentive to context, sensitive to the trade-offs between competing values, committed to the view that procedural choice is itself a substantive justice question, and resolutely opposed to the privileging of any single process on grounds other than its contextual fit. That methodological outlook is precisely what does not get lost in translation.

Carrie's own explicit commitment to cultural sensitivity in process design goes further than a general methodological pluralism. In her work on transitional justice, she has insisted that processes of truth, reconciliation, and accountability must be drawn from, and adapted to, the specific cultural, political, and historical circumstances of the societies in which they operate. She has consistently stated that importing, wholesale, models developed in one post-conflict context into another is a form of procedural imperialism, even when it is well intentioned (Menkel-Meadow 2015). The same insight applies to the domestic transplantation of dispute resolution practices into different cultural communities within a single legal system. For us, the challenge of designing appropriate processes for a mixed Jewish–Arab city in northern Israel has been, in this respect, a version of the same challenge that Carrie has theorized at the level of international transitional justice. The terms we use for these communities are themselves a reminder that no single label captures a people.[1]

[D] PROCESS PLURALISM IN THE MIDDLE EAST: THE HAIFA CASE

No case better illustrates the international reach and cultural adaptability of Carrie's framework than her engagement with the University of Haifa Law Faculty. Haifa, a mixed Jewish–Arab city perched on the slopes of Mount Carmel on the shores of the Mediterranean, is in many respects a microcosm of the Israeli reality: a place of genuine coexistence, alongside mounting tension, and unresolved historical grievance. When Carrie arrived there in 2008 for the first of three visits, each one deepening the relationship between her work and the dispute resolution community at

[1] In describing a shared Jewish–Arab civic space, we use terms—"Jewish", "Arab", "mixed city"—that necessarily compress communities whose members hold complex and varied civic, national, religious, and cultural identities, and each of which is named differently in different scholarly and political registers. We adopt consistent shorthand for readability, without taking a position among these usages or suggesting that any group is internally uniform.

Haifa, she could not have chosen a more demanding test for the claims of process pluralism (Milman-Sivan & Feinreich-Giloh 2026).

The course she taught (assisted by Irena Nutenko)—Creating New Peace Processes in the Middle East—brought together Jewish and Arab law students to explore ADR theory and to develop bottom-up proposals for inter-communal and regional dialogue (Menkel-Meadow & Nutenko 2009). The pedagogical choices were deliberate and significant. Rather than presenting American mediation practice as a model to be received and applied, Carrie invited students to use the conceptual tools of process design to imagine processes suited to their own deeply contested reality. The students generated their own proposals for dialogue, resource-sharing, and peacebuilding, proposals that were drawn from the experience of living at the meeting point of diverse national and individual narratives.

The course was itself an exercise in process pluralism. Because it took the diversity of conflict types seriously and privileged the parties' own perspectives and resources over any imported template, it could resist the pull toward pre-packaged solutions. What it modelled, then, was the very method it taught: contextual, and set against procedural imperialism. It is not surprising, then, that the course's effects outlasted the classroom by years. One graduate of the 2008 course, now a seasoned lawyer who never went to practise as a mediator, recalls that it nonetheless reshaped her sense of a lawyer's role, leading her towards interest-based, negotiated solutions that preserve relationships.[2]

Beyond the course's effect on individual students, Carrie's engagement with Haifa had substantial institutional ripple effects. Combined with the scholarship already developing in the faculty and with donor commitment to peacebuilding through legal education, it led to the establishment of a Dispute Resolution Clinic and a comprehensive ADR curriculum (Milman-Sivan & Feinreich-Giloh 2026). The Clinic trained mediators to operate in contexts that the existing American literature had not directly envisaged: mediating disputes between Jewish and Arab citizens in a shared city; working with the complex cultural and legal layering of Israeli family law; facilitating dialogue across communal and political divides whose depth and historical weight have no precise equivalent in any American setting. The Clinic developed its own practice, drawing on Carrie's framework while responding to the particular conditions of its setting.

Particularly striking is the development of the Shared Life Dialogue programme (co-directed by one of the authors), which brought together

[2] Conversation with a graduate of the 2008 course, June 2026; notes on file with the authors.

Israeli Jewish and Arab citizens in structured dialogue processes that drew on ADR principles while being adapted, in content and form, to the specific cultural and political context of Israeli society (Milman-Sivan & Feinreich-Giloh 2026). When the events of October 2023 placed almost unbearable strain on coexistence within Israel, it was to this programme, grounded in process pluralism but developed locally, that our community turned. Because the programme had been designed for its own context rather than imported into it, it proved unusually resilient under conditions of extraordinary stress.[3]

What is also notable about this trajectory is the way it exemplifies the global reach of Carrie's written work. Her 2004 *Journal of Legal Education* article did in writing what the Haifa course did on campus: it supplied a framework rather than a template. It set out the tools of process design and the normative commitments of process pluralism in a form that could be taken up and applied well beyond the American law schools for which it was chiefly written by introducing a way of thinking about procedure that resists universalization.

[E] WHAT CARRIE'S WORK TEACHES THOSE OF US BEYOND THE UNITED STATES

What non-US scholars and practitioners have taken from Carrie's work is a method rather than a finished product. The distinction matters practically as well as conceptually. A method can be applied, adapted, tested, and refined in new settings, generating new knowledge and new practices that feed back into the global conversation. For those of us in Israel who have worked to build a dispute resolution field in a complex, multilingual, multireligious society shadowed by political conflict, process pluralism has been precisely such a method. It has provided the vocabulary to explain why a one-size-fits-all approach to justice is inadequate across the different communities and cultural traditions that make up Israeli society. It has warranted a sustained investment in context-sensitive process design: developing procedures responsive to the parties and circumstances at hand, rather than transposing models devised elsewhere. And it has offered a normative foundation for the claim that access to justice means access to appropriate processes, not merely access to courts, nor access to any single model of non-adversarial resolution.

[3] This is not to present the programme as an unqualified success. We are candid that the system remains a work in progress—no formal evaluation has yet been undertaken, awareness of the available processes is uneven, and power imbalances persist (Milman-Sivan & Feinreich-Giloh 2026).

More broadly, Carrie's work has modelled a form of legal scholarship that is at once theoretically ambitious and practically grounded, a combination that is rarer in legal academia than it ought to be. Her insistence that process design is a substantive justice question, that procedures are not merely vehicles for arriving at outcomes but are themselves constitutive of justice or its absence (Rabinovich-Einy 2022), has reshaped how many of us think about legal systems worldwide. Part of what makes that contribution durable is Carrie's refusal to romanticize it. She is candid about process pluralism's darker side as well as its lighter one: crediting Lon L Fuller, she notes that each process carries its own morality and structures its own outcomes (Menkel-Meadow 2004); and she takes seriously the critique, associated with Laura Nader, that a coercive drift toward participatory "harmony" can be as unjust as the hierarchies it purports to replace (Nader 1993). That candour is also part of why her account travels. Her 2004 *Journal of Legal Education* article resonated precisely because it holds apart two claims: a set of near-universal normative process commitments to voice, participation, dignity, on the one hand, and on the other, the contextual question of which procedures serve those commitments in any given setting, namely a contextual fit.

Carrie has also modelled a distinctive scholarly generosity that those of us working in fields she helped to found have benefited from enormously. This generosity is not only a matter of temperament. It is built into the way Carrie writes, and specifically, in the manner she engages with scholarship produced outside the US. Her scholarship consistently foregrounds the voices of those who are least well served by existing legal systems, and her engagement with comparative and cross-cultural questions has always been characterized by genuine curiosity rather than the imposition of a prior framework. In writing for the global community of dispute resolution scholars and practitioners, she has given us permission to bring our own contexts and our own insights into the conversation.

The evolution of dispute resolution into the digital realm has added new dimensions to the challenge of cultural sensitivity that Carrie's framework is well placed to address. As dispute resolution processes go online through platform-based mediation, algorithmic decision-making, or artificial intelligence-assisted negotiation, the question of cultural fit becomes more urgent, not less. What does procedural justice mean when parties from different cultural backgrounds interact through platforms designed in Silicon Valley? How do we ensure that online dispute resolution processes are sensitive to the communication norms, power dynamics, and relational expectations of users across the world (Katsh &

Rabinovich-Einy 2017)? These are the questions that process pluralism equips us to ask and that Carrie's sustained engagement with the evolving technological landscape of dispute resolution (Menkel-Meadow 2016) has ensured remain at the forefront of scholarly and practical attention.

[F] CONCLUSION: A FRAMEWORK FOR EVERYWHERE

There is something fitting about the fact that it is Haifa, a city that has made coexistence its identity and its aspiration, that offers a vivid illustration of process pluralism in action beyond the US. Carrie came to Haifa asking what a group of young Jewish and Arab law students might themselves imagine for their own world. In doing so, she practised what she has theorized for four decades: that the deepest respect for another culture's capacity for justice is to offer it not your answers, but your best questions.

To sum, this essay has argued that the international reach of Carrie's work on the study and practice of mediation is a direct outcome of her work's core values and commitments. Process pluralism is inherently a culturally sensitive framework because its core commitment—to match procedures to contexts, parties, and values rather than imposing a universal template—contains within it an imperative to adapt, rather than replicate, in every new setting. That imperative has made it one of the most genuinely global contributions to the study of dispute resolution in our time.

For those of us who have built dispute resolution programmes and curricula in non-US settings on the foundation of process pluralism, the tribute owed to Carrie is immense: she gave us the tools to do our work. She taught us to ask the right questions. And she showed us, by example, that a commitment to justice need not choose between universality and cultural sensitivity that, properly understood, the two are not in tension at all. What is universal in it is this: the insistence that every side be heard, that voice and dignity be respected, that justice be pursued. What varies—and must vary—is the form those commitments take in any given setting. Process pluralism is a universal methodology precisely because it takes particularity seriously. It is, in the most generous sense of the word, a framework for everywhere.

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Marginal Doors? Avoidance and Violence in the Multi-Door World of Process Pluralism

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Abstract

At the heart of Carrie Menkel-Meadow's work lies "process pluralism", the recognition that responses to disagreement extend beyond litigation. This essay, offered in her honour, argues that the pluralist repertoire, viewed sociologically, should embrace the neglected ends of the processual spectrum more firmly: avoidance and prevention at one end, self-help and violence at the other. Drawing on legal anthropology, the sociology of conflict and Chinese materials, it proposes that process links structural and situational accounts of both. Seen from the poles, the middle ground of negotiation, mediation, umpiring and hybrid processes appears as a valuable but partial repertoire.

Keywords: dispute resolution; process pluralism; avoidance; dispute prevention; violence; self-help; mediation; Menkel-Meadow; sociology of conflict; China.

[A] INTRODUCTION

Few scholars have done more than Professor Carrie Menkel-Meadow to encourage in dispute resolution discourse the understanding that the responses to disputing are plural. Her early writings in the still-emerging field of alternative dispute resolution (ADR) reconstructed negotiation as problem-solving rather than adversarial bargaining (Menkel-Meadow 1984), offered a carefully qualified defence of settlement (Menkel-Meadow 1985a; 1995), tested models of negotiation against what lawyers actually do (Menkel-Meadow 1993) and diagnosed the limits of binary, adversarial thinking (Menkel-Meadow 1996). She had long held that disputes of different kinds may need different processes (Menkel-Meadow 1999: 57), and by 2002 "process pluralism" had become the heading for her account

[1] This essay returns to issues explored earlier in Palmer (2020; 2023).

of "different modes for different claims" (Menkel-Meadow 2002: 42),[2] and her later work has carried the concept into hybrid and mixed processes (Menkel-Meadow 2020), transitional and restorative justice (Menkel-Meadow 2015) and dispute resolution as civil justice (Menkel-Meadow 2024), and so beyond civil disputes into criminal and international justice (Menkel-Meadow 2015: 6-8, 13-14; 2020: 416; 2024: 4, 19). Each returns to the same refrain: one size does not fit all (Menkel-Meadow 2015: 4; 2020: 407; 2024: 20). The repertoire of response to social disagreement is far wider than adjudication and litigation; choices about decision-making involve important values; and legal scholars should look outside the courtroom in order to see the bigger picture.

This essay is offered in her honour. It argues that the foundational notion of process pluralism, taken seriously but viewed with more of a sociological perspective, should extend to include more determinedly the two ends of the processual spectrum that mainstream dispute resolution scholarship tends to neglect: avoidance—together with its forward-looking relative, prevention—at one end, and self-help, above all violence, at the other. Empirically, these too are common human responses to trouble. Analytically, they show how much of standard process theory in ADR is in fact a theory of the middle ground of negotiation, mediation and umpiring, an orientation that understandably reflects the concerns of legal practice and is not misplaced: the middle ground gives the parties a voice, keeps conflict within manageable bounds, and frequently yields outcomes that neither withdrawal nor force could secure. Normatively, the two ends test the values of consent, procedural fairness, participation and compromise that ADR scholars hold. The discussion builds on my earlier work (Palmer 2014a; 2014b; 2020; 2023; Palmer & Roberts 2020), on Simon Roberts's anthropology of order (Comaroff & Roberts 1981; Roberts 2013b), and on studies of avoidance by Philip Gulliver (1996) and Fiona Cownie and Anthony Bradney (2020). Section [B] examines why the field has gravitated towards the middle ground. Sections [C] and [D] take each pole in turn. Section [E] argues that process, occupying the interstitial space between structural and situational accounts of violence, and of avoidance and prevention alike, is the link that both usually lack, and draws out what the poles teach process pluralism.

[2] Menkel-Meadow and her co-authors gave the term programmatic form in the preface to the first edition of their casebook, subtitled "Beyond the Adversarial Model" because "modern life requires additional processes that better meet the needs of parties in conflict" (Menkel-Meadow & Ors 2005: xxxiii).

[B] THE PULL OF THE MIDDLE GROUND

Societies around the world provide disputants with a range of processes that can be called into operation when trouble arises (Nader & Todd 1978: 8). Typologies of response usually run from avoidance at one end, through negotiation, mediation and umpiring, to coercion and violence at the other (Nader & Todd 1978: 9-11). Even in this continuum of ideal types, the two poles were seldom treated as a further core opposition. Rather, they were added as afterthoughts, to round out the picture (Palmer & Roberts 2020: 105). Frank Sander's "multi-door courthouse" (Sander 1979) institutionalized a version of the continuum, with a professionally conservative reluctance to move away from the court as centre stage (Palmer 2014a), and Menkel-Meadow, perhaps more than anyone, gave the multi-door vision its intellectual depth, insisting that each door have clarity of purpose and its own ethical commitments while rejecting Lon Fuller's view that the integrity of each process forbids their mixing; hybridization, she argues, "reflects an integrity of its own" (Menkel-Meadow 2020: 418-419). The courthouse image was innovative in its own way, but as a symbol it carried a cost. The court may be where the cases are, but it is not where most disputes are (Palmer 2014a: 30; Palmer & Roberts 2020: 307-309).

Attention has since concentrated overwhelmingly on the middle of the continuum. Negotiation, mediation and umpiring hold out the promise of resolution, whereas the poles are primarily unilateral modes of decision-making, offering much less certainty in the parties' future relations, and violence tends to stray out of civil disagreement into criminal justice and public disorder (Palmer & Roberts 2020: 101-102, 105). The concentration also reflects the way the discipline constitutes its object. Legal scholarship has ordinarily worked within an "authority paradigm", building knowledge from texts that carry normative authority rather than within the "enquiry paradigm" of the social sciences, so that only what reaches an authoritative forum registers as legal knowledge at all (Samuel 2009: 437-438, 449-450). Avoidance and much violence fall outside the field's vision not through oversight but by construction; and ADR scholarship, for all its suspicion of the courtroom, has inherited that object. Robert Cover put the starkest form of the point: "Legal interpretation takes place in a field of pain and death" (Cover 1986: 1601). A judge's reading of a text sets in motion an organized practice of violence resting on the state's claim to, in Max Weber's phrase, "the monopoly of the legitimate use of physical force" (Weber 1946: 78). The umpiring at the centre of the spectrum does not stand apart from the violence at its edge; its authority depends on it.

The costs of the concentration from a sociological perspective were identified long ago. William Felstiner and his colleagues (1980-1981: 636) showed that only a small fraction of injurious experiences ever mature into disputes, and that most of the attrition occurs in the earliest, often unperceived, stages of naming, blaming and claiming. Where grievance apathy has done its work, reforms that equalize access at the later stages may achieve less than hoped, because by then the horse has bolted (Felstiner & Ors 1980-1981: 636-637; Palmer & Roberts 2020: 106). Menkel-Meadow's own work has never been guilty of narrowness: her account of the founders of ADR (Menkel-Meadow 2000), her analysis of the drift to "semi-formal" institutions (Menkel-Meadow 2013) and her work on transitional justice (Menkel-Meadow 2015: 8, 24) all attend to the whole institutional framework, and her insistence that theory be tested against practice drew on studies showing most lawyer negotiation to be conventional and low in intensity, and on her own observation of court mediation, in which polarized orientations met in a "compromised middle" (Menkel-Meadow 1993: 369-371, 376-377). The present essay extends that method to the ends of the spectrum.

Even within her framework, though, the two poles have remained at the margin.[3] In 1985 she observed that "many grievances, problems, or troubles never fully ripen into disputes", asked whether some disputes should be "avoided, or eliminated" and others "provoked, encouraged", and called for research into why some disputants avoid seeking redress (Menkel-Meadow 1985b: 27, 30, 40, 42-43). That agenda did not become part of process pluralism. Avoidance recurs only briefly, as "lumping it" (Menkel-Meadow 1999: 57) and as the forgetting with which some societies meet past atrocity (Menkel-Meadow 2015: 5, 15), though her recent treatment of civil justice begins by listing avoidance and self-help among the responses people make before they turn to law (Menkel-Meadow 2024: 1). Force follows a similar course: it figures as metaphor, as the vice that vitiates consent and as the backdrop to transitional justice, and only occasionally enters her classifications (Menkel-Meadow 2006: 560, 570; 2010: 600; 2020: 418). Sometimes she comes close to conceding that the imposed pole is present within the consensual one, as when dispute system design is said to depend on the courts "if only as a shadowy 'threat' of an alternative command process" (Menkel-Meadow 2009: 220).

[3] The pattern can be traced across four decades. On avoidance, non-claiming and forgetting, see Menkel-Meadow 1985b: 27, 30, 40-43; 1999: 57; 2009: 225-226; 2015: 5, 15; 2024: 1. On prevention, see 1985b: 42; 2006: 576-578; 2020: 405, 407. On force, coercion and violence, see 2003: 348-349; 2005: 584; 2006: 560, 570; 2009: 205, 211, 220; 2010: 600; 2012-2013: 79-81, 86-87; 2020: 418. In each case the pole is acknowledged succinctly, and the analysis then returns to consideration of the consensual and adjudicative processes of the middle ground.

If process is anchored in voluntary participation, avoidance falls before process and violence after it, while the trial stands between them as "a contained form of structured verbal 'violence'" (Menkel-Meadow 2005: 584). She identifies the poles and recognizes them as primary forms of response to trouble (Menkel-Meadow 2024: 1), but concentrates on the processes between them. The sections that follow treat avoidance and violence not as the outer limits of the processual range but, more sociologically, as processes in their own right.

[C] AVOIDANCE AND PREVENTION

Conceptual ground

Avoidance is non-confrontational, but beyond this it is not easy to define. Felstiner (1974: 76) first drew attention to its socially widespread nature, though some of his examples, as he conceded, failed to distinguish avoidance as a way of processing an existing dispute from avoidance adopted to prevent disputes arising (Felstiner 1975: 695). Gulliver (1996) distinguished dispute avoidance, evasive conduct once disagreement has emerged or is likely to surface, from what he called "conflict management", the more or less conscious prevention of disputes. The label is awkward, since avoidance is itself a way of managing an emerging disagreement, and dispute prevention is the better term (Palmer 2023: 41-42); but the distinction is valuable even though the two often shade into each other (Palmer & Roberts 2020: 107-108). Georg Simmel had already seen that such conduct need not mark the absence of a relationship: in the metropolis a finely graded latent antipathy secures "the distances and avoidances" without which urban life could not be led (Simmel 2009: 232). Avoidance of this kind is conflict held in reserve, not the "mere mutual indifference" that Simmel treated as the true opposite of both conflict and association (Simmel 2009: 227). Its forms are various: "lumping" the grievance, ostracism, turning the other cheek, refocusing the relationship elsewhere, even accepting an unjustified claim in order to end the interaction. Avoidance may be a temporary strategy, stalling or exerting indirect pressure on an opponent who wants a quick outcome; or it may harden into permanent estrangement, sometimes inherited by the disputants' heirs (Palmer 2023: 43).

Ethnographic lessons

When does avoidance flourish? The dominant answer has been "econocentric": avoidance is chosen where its costs are low. Felstiner (1974), drawing on Max Gluckman's (1955: 18-19) distinction between single-interest and multiplex relationships, argued that "the cost of avoidance is always a reduction in the content of the relationship", so that it should be rarer where relationships are multiplex and enduring and commoner where bonds of kin, work and place are weak (Felstiner 1974: 76-84). M P Baumgartner's suburb of "Hampton",[4] where amid privacy, material independence and loose-knit networks avoidance was the dominant technique of conflict management, part of a wider "moral minimalism", supplied a classic confirmation (Baumgartner 1988: 10-13). The ethnographic record resists so simple an account. Gulliver observed of the Arusha and the Ndendeuli that avoidance was rare under precisely the converse conditions (Gulliver 1996: 140), and in the early stages of disagreement emotion may crowd out cost calculation altogether (Palmer & Roberts 2020: 113-114). Bradney and Cownie's ethnography of a British Quaker Meeting confounds the cost logic from another direction. The Meeting is a community of multiplex relationships, where on Felstiner's and Baumgartner's accounts avoidance should have been costly and rare; yet over five years of fieldwork there were very few disputes that were more than trivial (Cownie & Bradney 2020: 66, 68-69; Bradney & Cownie 2000: 152-153, 163). The Quaker Business Method seeks consensus slowly, as members wait to see where the "Inner Light" leads, and records each decision in a minute agreed by all. Quaker law is thus a matter not of rules but of process, and decisions that everyone has wholeheartedly agreed are unlikely to generate disputes (Cownie & Bradney 2020: 65-66). This is dispute prevention built into a community's constitutive procedure, which Bradney and Cownie, following Gulliver, call conflict management (Cownie & Bradney 2020: 69-70). It approximates what Cover called a "paideic" legal order, in which obedience follows from understanding, not from enforcement (Cover 1983: 12-14). Such an order does not refute the state's violent field of interpretation; it sits alongside it, and Cover's *dictum*, Bradney and Cownie conclude, "does not apply to Quakers" (Cownie & Bradney 2020: 66). The preventive pole can have its own law, and not all law draws its authority from the violent pole. Roberts would have called this order rather than law (Roberts 1998), and the choice matters: to call such orders law risks drawing them back into the authority paradigm that keeps avoidance and prevention out of view. Carol Greenhouse's (1986) Southern Baptists of "Hopewell", Georgia,

[4] A pseudonymous, largely affluent suburb in the New York metropolitan area.

offer a different lesson. For these believers disputing is itself unchristian, since Jesus is the judge of all people. Accordingly, conflict is met with narrative, gossip, joking and prayer, and the dispute is acknowledged only obliquely (Greenhouse 1986: 110; 1989: 255-256). Do they avoid disputes, or avoid resolving them (Cownie & Bradney 2020: 67)? The Quakers, we may say, practise prevention; the Southern Baptists practise avoidance; and the suburbanites of Hampton practise a further kind of avoidance, made affordable by the thinness of their ties.

Ideologies of avoidance and harmony

Avoidance conduct is often sustained by ideology. Felstiner suggested that Americans absorb much of their interpersonal conflict through avoidance (Felstiner 1974: 86), and Greenhouse treats Americans' belief in their own litigiousness as a cultural self-representation (Greenhouse 1989: 252, 254). In Chinese society the Confucian valorization of harmony (和, *he*) does comparable work.[5] The superior person (君子, *junzi*) does not allow himself to be drawn into disputes and, if one arises, transcends it by yielding (让, *rang*); the imperial state, for all the sophistication of its legal institutions, expected parties to settle their differences outside the courts, with mediation by lineage or guild leaders as a secondary line of defence (Huang 1996: 12-13; Palmer & Roberts 2020: 97-98, 111-112). The ideal was refurbished in the People's Republic of China (PRC) as a "socialist harmonious society" (社会主义和谐社会, *shehui zhuyi hexie shehui*). It also persists in popular anti-litigation sentiment (Palmer 2023: 45). The contemporary situation shows how far the logic can run. Community mediators, judges and administrative officials have all been expected to resolve, and where necessary suppress, disputes once they arise, and to prevent them arising at all (Palmer & Roberts 2020: 157), and "grand mediation" (大调解, *da tiaojie*) has further entrenched people's mediation committees into a state-built hierarchy (Palmer 2014a: 41). Avoidance, prevention and suppression here become less the choices of disputants than tasks of the party-state. Avoidance can also work at the scale of a whole polity, as in the "collective amnesia" that others have observed in post-Pinochet Chile (Menkel-Meadow 2015: 15).

[5] Chinese material is drawn on in several places for two reasons. The first is personal: my understanding of Chinese disputing was formed in field research in the New Territories of Hong Kong and later as Dean of a mainland Chinese law school. The second is analytical: China offers an unusually long and well-documented record in which a single society shows the whole spectrum at work, from a cultural ideal of yielding and harmony, through a revolutionary period in which class ideology recast civil quarrels as occasions for coercion, to a party-state in which avoidance, prevention and suppression have become official tasks. See, generally, Palmer 2025.

Laura Nader's (1990) analysis of "harmony ideology" reminds us that the preference for harmony, like the preference for forgetting, is not innocent. Processes that emphasize harmony, compromise and the language of therapy may suppress talk of and protest against injustice (Nader 1990: 2, 291, 306-307). Menkel-Meadow has always taken this caution seriously, as did Roberts (2013a): her defence of settlement has been a defence "in some cases", alert to the danger that the weak may be pressed into peace (Menkel-Meadow 1985a; 1995). The same discrimination is needed for avoidance. The strategic withdrawal of a party conserving resources is quite different from the resignation of the aggrieved person who feels they have no choice. Gulliver would exclude the latter from avoidance proper (Gulliver 1996: 128), but the analyst's ability to detect intention is doubtful, and even overwhelming structural pressure does not necessarily mean that no decision is made (Palmer & Roberts 2020: 110; Palmer 2023: 44). The boundary also moves over time: as Marc Galanter (2010: 125) observes, expanding knowledge and social capability turn misfortunes once accepted as fate into injustices waiting to be named. Grievance apathy sits uneasily on the boundary of the category, but squarely within the concerns of access to justice.

The preventive turn in legal practice

Prevention, unlike avoidance, is explicitly forward-looking, and it has quietly become part of the established practice of law. Prenuptial agreements, collaborative lawyering, partnering, risk analysis and careful project design are all intended to avert future disputing or to clarify rights should disagreement arise (Palmer & Roberts 2020: 108-109; Palmer 2023: 42-43). Here one of Menkel-Meadow's founding contributions bears directly on the neglected pole. The problem-solving conception of the lawyer's role (Menkel-Meadow 1984), later generalized into a multidisciplinary vision of legal education (Menkel-Meadow 2004), has an implicitly preventive dimension: its attention to the parties' long-run needs and continuing relationships (Menkel-Meadow 1984: 802-803, 835) points towards the lawyer as designer of arrangements rather than champion in a contest of positions, and she herself counts dispute prevention among the gains that hybrid processes may bring (Menkel-Meadow 2020: 407). The United Kingdom construction industry shows how far prevention can be written into the constitutive documents of commercial life. Standard form contracts commit the parties to mutual trust and cooperation, oblige them to give early warning of any matter that could increase the price or delay completion, and maintain risk registers; dispute boards appointed at the outset attend the site and try to resolve

differences before they harden (Gould & Liang 2022: 158-159, 165-167). As in the Quaker Meeting, prevention is built into a constitutive procedure. It also has limits: the risk register does not alter the contractual allocation of risk, so that prevention is layered over an adversarial allocation instead of replacing it, and a board empowered only to recommend may be little used (Gould & Liang 2022: 158, 166-167). Prevention appears to work best where imposition remains available in the background. In this sense dispute prevention is process pluralism practised *ex ante*.

[D] VIOLENCE

Characterizing violence in disputing

At the other end of the spectrum lie the forms of self-help, and in particular recourse to violence: primarily the use or threatened use of physical intimidation intended to secure the outcome the violent party prefers, or antagonistic conduct arising from loss of self-control in the course of disagreement (Palmer 2020: 89). Like every other mode of response, violence occurs within a social relationship. Unlike most, it often amounts to a rejection of all other modes. Short of direct physical coercion, however, even the cruellest domination still leaves "a substantial measure of personal freedom" (Simmel 2009: 130). Imposed outcomes, like consensual ones, retain an element of choice, and the line between the two sides of the conventional dichotomy is less sharp than it appears. Recourse to violence is often part of a process of closure—a social definition of the relationship as finished and non-negotiable—and in this respect it resembles avoidance. It also repudiates the procedural fairness and compromise central to negotiation and mediation (Hampshire 1989: 74-75), a theme from which, by way of Stuart Hampshire's later work, Menkel-Meadow builds her own case for process pluralism (Menkel-Meadow 2002: 38; Hampshire 2000).

Physical force is not the whole of the matter. The United Nations counsels that domestic violence be understood as embracing sexual, psychological and economic violence as well as physical (United Nations 2010: 24-25), and broader still are Johan Galtung's categories of structural violence, the injury embedded in inequality (Galtung 1969: 170-171), and cultural violence, which legitimizes it (Galtung 1990: 291). Just as societies propagate harmony ideologies, so there are ideologies of violence. In China during the Cultural Revolution (1966-1976) an ideology of class difference recast routine civil disputes in revolutionary terms: contradictions among "the people" were to be handled by persuasion, but

the same quarrel between one of the people and a class "enemy" became an antagonistic contradiction, to be handled by the coercive methods of dictatorship (Palmer & Roberts 2020: 118-119; Lubman 1967). The structural substrate persists: the Anti-Domestic Violence Law (反家庭暴力法, *fan jiating baoli fa*) of 2015 came only after long delay and has operated imperfectly (Palmer 2017; Palmer & Roberts 2020: 119-120), and local insistence that mediation is the only appropriate response has at times had tragic consequences (Palmer 2014a: 20; 2017).

The boundaries of the category are unstable. Does violence include its threat? From the Ming dynasty it was a specific offence to drive another person to suicide (威逼人致死, *weibi ren zhi si*), and by the mid-19th century causing another's suicide was treated as virtually a category of homicide (MacCormack 2018: 217). The same concern survives in the justification for early intervention by people's mediators, who must nip the "contradiction" in the bud before it degenerates into violence, under the slogan "combine mediation and prevention, and give primacy to prevention" (Palmer 1988: 235; Palmer & Roberts 2020: 106). Gossip is a case in point. It appeared among the Southern Baptists as a technique of avoidance, and may be the beginning of a moral inquiry, not prying misconduct (Rose 1983: 9). Yet the untruths it carries may ruin a reputation, as even its defenders concede (Alfano & Robinson 2017: 485), and may provoke physical violence in reply (Palmer & Roberts 2020: 117). Gossip belongs to both neglected poles at once. Nor will the line between civil and criminal hold the category steady. Crime and violence overlap less than one might suppose, for violence plays no part in most offences, while much violence, being the work of states and armies, is never counted as crime at all (Ray 2017: 178).

Institutionalized forms

Anthropology and legal history provide many examples of violence as a legitimate, rule-bounded way of bringing disputes to a close: aggression given a limited and formalized expression that may stand in for something worse. Self-help survives in modern legal systems within limits set by the state, so that, contrary to Weber, no state in practice monopolizes the legitimate use of force (Ellickson 2017: 50-52). Much conduct classed as crime is itself self-help, the expression of a grievance by unilateral aggression, and so a mode of social control, not a sign of its breakdown (Black 1983: 34). In organized crime, violence and its threat underwrite a private dispute settlement on terms the stronger party can impose, and a reputation for violence, once established, deters challenges and lets later

disputes be settled by threat rather than force—the violent pole performing, in inverted form, the preventive work of its opposite (Gambetta 1993: 159, 169-171; 2009: 78, 91). Ritualized competitions, from wrestling and the Inuit song duel through to their modern descendants, keep the competitive form while shedding the violence (Roberts 2013b: 117-128), and the record has even inspired contemporary design. In the experimental "Karaoke Court" the parties sign an arbitration agreement and sing their cases for a binding decision (King 2016). The feud institutionalizes retaliatory violence between groups: Fernanda Pirie's Amdo pastoralists hold two sets of norms in constant tension: elaborate mediatory mechanisms for containing violence, and a felt obligation in certain contexts to resort to it (Pirie 2007: 54-55, 63-65). The local agencies of the Chinese state have been drawn into this machinery of truce and compensation without displacing it (Pirie 2007: 65). Vigilantism persists on the margin between lawful and unlawful, delivering a rough justice that state law is felt unable to secure (Smith 2019). What these forms share is that violence operates within parameters of acceptable conduct that confine aggression in the interests of order in the wider polity. As soon as there is "some limit to violent action", Simmel wrote, "there is indeed a force for making a society, even if only as restraint" (Simmel 2009: 236).

Impulsive violence and the micro-situation

Not all disputing violence is institutionalized or instrumental. Institutionalized forms incline to instrumental violence, used to secure compliance; impulsive outbursts to expressive violence, inflicted in anger without any necessary goal. Here the work of Randall Collins (2008) is valuable, if provocative. His central claim is that violence is difficult. Most people in most disputes, however motivated, do not fight. This is because they cannot overcome barriers of confrontational tension and fear; explanations based on social background assume that violence flows readily once motivation exists, but micro-situational evidence suggests otherwise (Collins 2008: 20-21). Socialized into cooperative exchange, people are often clumsy and unskilled in handling the prospect of force (Palmer & Roberts 2020: 120-121). When violence does occur it follows identifiable situational pathways—a victim whose fear is read as weakness, an audience whose presence makes backing down costly. Tense situations, rather than violent persons, generate violence, and even people known to be violent are not violent most of the time. In this the poles differ: avoidance can be protracted and even inherited, whereas violence, sustained domestic abuse apart, tends to be episodic (Collins 2008: 14; Palmer & Roberts 2020: 120).

Collins's critical framing extends to the moral architecture of the category. "Good" violence, carried out by duly authorized agents of the state, is not seen as violence at all, and violence licensed but not formally authorized can escape notice too. In the Cultural Revolution the beating and killing of "class enemies" by Red Guards and local militia were encouraged from above, the public security organs were told not to intervene (MacFarquhar & Schoenhals 2006: 124-125, 128-129), and mediation was condemned for promoting "class harmony" (Palmer 1988: 220, 228). Only after 1976 was the period of the Cultural Revolution renamed "the decade of chaos" and its violence recognized as violence. Menkel-Meadow counts China among the societies that have chosen not to reckon publicly with mass atrocities of this kind (Menkel-Meadow 2015: 22). Whether violence is seen at all, in other words, depends on who licenses it and on the processual categories through which it is named. How the killing was produced matters as much as how it was named. Where it was most extensive, Yang Su (2011: 1-34) argues, it was organized through local state and community structures that turned central calls for class struggle into collective action. The centre supplied the rhetoric of class war but no plan of extermination. What made the rhetoric lethal was its reception by county, township and village cadres and their militias, at a moment when the ordinary legal restraints on killing had been demobilized and the countryside recast as a theatre of war, so that the killings were, in his words, "a result of both state sponsorship and state failure" (Su 2011: 24). The ideology of class war, that is, did not reach the encounters in which neighbours killed neighbours directly. It reached them through the processes by which a community categorized its members, designated its enemies and organized to act against them. That is the argument of section [E] below, reached from the other direction: structure enters the violent situation through process. The point converges with Cover's account of how a judge's words become violent deeds through an organization that suppresses the inhibitions of those who carry them out (Cover 1986: 1613-1615). The violent pole is not sealed off from lawful umpiring: violence is present along the whole spectrum, distributed and named differently at different points.

The macro and the micro: an unresolved problem in the sociology of conflict

The confrontation between Collins and the structural tradition is a local instance of a problem that has troubled the sociology of conflict since Simmel and Lewis Coser pressed the discipline to treat conflict as a social form in its own right (Coser 1956; Simmel 2009): the

relation between macro and micro. One line of thinking, culminating in Galtung's categories, explains violent conduct by inequality, exclusion, domination and the ideologies that legitimate them. The other, of which Collins is the most rigorous contemporary exponent, insists that broad conditions do not fight; only situations do. Each is weakest where the other is strongest. Structural theory cannot say why, under identical conditions, violence erupts here and not there, now and not then, nor why most of the deprived and dominated are, most of the time, not violent at all. Situationism cannot say why the same micro-dynamics of tension, weakness and audience produce such different rates, forms and targets of violence across societies and periods. Part of the difficulty is conceptual: structural accounts speak mostly of conflict, the broad and often long-lasting struggle in which trouble arises without any rule being broken, and situational accounts mostly of encounters, and neither has much to say about the dispute—a grievance voiced as a claim and rejected—that lies between them (Palmer & Roberts 2020: 104-105). In the terms that Geoffrey Samuel adapts from Jean-Michel Berthelot, the one reasons through structural and causal schemes of intelligibility and the other through something closer to an actional scheme, and neither can be reduced to the other (Berthelot 1990: 62-82; Samuel 2014: 81-89). The limits of a purely situational account are visible in Collins's own materials, which are mainly North American and should be treated as tentative until tested across cultures (Palmer 2020: 100). Two Chinese cases illustrate the point. In the first, a poor rural woman, repeatedly battered, killed her husband after her complaints had been brushed aside as an ordinary state of affairs by the local Women's Federation, the people's mediation committee and the police. In the second, a prosperous American migrant in Beijing, violently abused, posted photographs of her injuries online, refused mediation, won massive public support and successfully sued for divorce (Palmer 2017; 2020: 99). A full explanation must rest on both macro and micro. That conclusion, however, merely restates the problem. What is still needed is an account of how macro conditions enter micro-situations.

[E] PROCESS AS THE MISSING MIDDLE: WHAT THE POLES REVEAL FOR PROCESS PLURALISM

Menkel-Meadow's work supplies something that the sociology of conflict has lacked, namely the processual middle. Structure and situation meet in process. A dispute process is at once a structure—an institutionalized repertoire with its own rules of access, form and authority—and a sequence of actions taken within an encounter, so that it is the place where structural and actional explanation must be combined rather than chosen between. Harmony ideology, patriarchal values and ideologies of violence do not act on disputants directly. They act through the repertoire of processes that a society makes available to people in trouble, withholds from them, or imposes on them. The mediation committee that dismissed the battered rural wife's complaints was the mechanism by which patriarchal values entered her micro-situation and helped to produce its violent outcome. The online forum through which the American woman refused mediation and summoned an audience of millions was the mechanism by which a quite different structural position entered hers. Collins tells us that much violence turns on perceived weakness and the presence of an audience; the two cases suggest that both are to a significant degree constituted by the processes on offer. Menkel-Meadow's own observational work points the same way: a minority of lawyers and parties in court mediation proved open to a new process and saw it as an opportunity to improve their own negotiating, which she took to justify the claim that mediation can serve an educative and transformative function (Menkel-Meadow 1993: 377).

The socio-legal literature on the transformation of disputes supplies a vocabulary for this mechanism. Felstiner and his colleagues (1980-1981: 639-649) treated naming, blaming and claiming as transformations themselves transformed by parties, reference groups, lawyers, officials and dispute institutions, professionals in particular defining a client's problem in terms of the services they offer. Lynn Mather and Barbara Yngvesson (1980-1981) showed that disputes are narrowed, fitted into established categories, or expanded, reframed in terms that connect them with wider social issues, as they come before third parties and audiences. Both transformations are processual, and each carries structure into the dispute: the mediation committee narrowed the rural wife's grievance to a family quarrel apt for reconciliation; the online audience expanded the Beijing case into a public question about domestic violence. Lauren Edelman and colleagues show the same process inside the organization, where internal complaint procedures recast discrimination claims as

managerial problems, often handled as "mediation", so that a public right was privatized and depoliticized (Edelman & Ors 1993: 501, 515, 530), and Menkel-Meadow's work on restorative justice carries it to the scale of the polity, where truth and reconciliation commissions turn individual testimony of injury into public acknowledgement (Menkel-Meadow 2007). The anthropology of dispute processes leads to the same conclusion. As Roberts and I have argued, the public sphere is always present in social life, taking its simplest form wherever a third party observes a bilateral exchange and offers the tacit assurance that "this is the way things are done" (Palmer & Roberts 2020: 80-82). Collins's audience is this elementary public sphere seen from inside the violent encounter, and whether it urges a quarrel on or calms it depends on the processual expectations it brings. Institutions can route disputes around the danger point, as when Kgatla disputants, fearing a fight, skipped bilateral negotiation and went straight to senior kin (Comaroff & Roberts 1981; Palmer & Roberts 2020: 95-96): the shape and availability of processes govern how tension in an encounter is handled. *Rules and Processes* supplies the theoretical ground: Tswana norms formed a loosely ordered repertoire on which disputants drew in constructing competing "paradigms of argument", so that disputes were moments at which the wider socio-cultural order was invoked, contested and reproduced (Comaroff & Roberts 1981). Structure, on this account, enters the dispute as the stock of normative and relational resources with which the parties argue, and is remade by the outcome. That is the connection between levels that neither structural nor situational accounts of violence supply.

The same holds at the other pole. Accounts of avoidance also divide between the structural, which explains it by the shape of social relationships (Felstiner 1974; Baumgartner 1988: 12-13), and the situational, which stresses the early encounter in which emotion and the urging of others decide whether a grievance is pressed or dropped (Palmer & Roberts 2020: 113-114). Neither explains the Quaker Meeting. Bradney and Cownie find the explanation in the Business Method: because each corporate decision is meant to be the personal decision of every member, there is nothing left to dispute, and the naming, blaming and claiming through which grievances become disputes were "largely absent" (Bradney & Cownie 2000: 153, 166). The same culture had its price, for when disputes did arise the Meeting was poor at resolving them (Bradney & Cownie 2000: 153-157). Process can also produce avoidance instead of preventing trouble: when the mediation committee treated the rural wife's complaints as an ordinary family matter, withdrawal was not simply chosen. Instead, it was manufactured, as a structural preference

for harmony entered the encounter through the repertoire on offer. Prevention is the clearest case of all, for it is process designed in advance to carry structural expectations into future encounters. At both poles, then, process channels a society's patterns of conflict into the individual choice to fight, to withdraw, or never to quarrel at all. On this reading, process pluralism is a sociological perspective as well as a design template for court reformers: to study the whole range of response is to study how the macro becomes the micro.

Chinese handling of disputes between citizen and state shows the mechanism at the level of the polity. The Administrative Litigation Law (行政诉讼法, *xingzheng susong fa*) of 1989 barred the people's courts from using mediation to decide the substance of an administrative case. From the mid-1990s, however, trial judges increasingly mediated before trial, after which the plaintiff withdrew the suit, in some localities in as many as 60% of first-instance cases, and rules issued by the Supreme People's Court (SPC) in 2007 regularized the practice under the name of settlement (和解, *hejie*) (Palmer 2014b: 108-112). A law intended to control the state became in part an instrument for controlling the citizen (Palmer 2014b: 120, 123), while discontent with administrative misconduct flowed less into litigation than into petitions, strikes and local protests (Palmer 2014b: 116). Where the processual channel for a grievance against the state is narrowed, trouble moves towards the poles: towards lumping on one side and collective confrontation on the other. Yet, in parts of eastern Guangdong, revived lineage elders' groups (老人组, *laoren zu*) now settle village disputes and are tolerated precisely because they keep order (Palmer 2014b: 113-114): the same ideology works through different processual channels, suppressive in the courtroom and preventive in the village.

What, then, do the poles teach process pluralism? First, they expose the limits of the field's organizing dichotomy. The standard characterization sorts processes by the source of the outcome: negotiation and mediation are consensual, adjudication and arbitration imposed. Avoidance and violence fall outside it. Both are *unilateral*: avoidance a unilateral withholding of interaction, violence a unilateral imposition without authority. Neither seeks the other party's consent, and neither claims the legitimate authority on which imposition ordinarily rests. Their neglect flatters the tidiness of a divide which practice blurs even in the middle of the spectrum, as I have argued elsewhere (Palmer 2014a), as Menkel-Meadow's "semi-formal" justice suggests (Menkel-Meadow 2013), and as her analysis of hybrid processes shows in detail—consensual processes made mandatory, porous categories, voluntarism inverted (Menkel-

Meadow 2020: 405, 409-410, 412-413). Court-mandated mediation, costs sanctions and judicial case management (Roberts 2013a) sit uneasily with the voluntarism on which mediation's legitimacy rests (Palmer 2014a: 19, 37-38), and the courts of England and Wales have since moved in that direction: the Court of Appeal has held that a court may lawfully order parties to engage in non-court-based dispute resolution, departing from the earlier view that compulsion would obstruct access to the court (*Churchill v Merthyr Tydfil County Borough Council* 2023; *Halsey v Milton Keynes General NHS Trust* 2004); the Civil Procedure Rules now give an express power to order participation in ADR (CPR 3.1(2)(o)), and the High Court has used it to order unwilling commercial parties to mediate shortly before trial; they settled (*DKH Retail Ltd v City Football Group Ltd* 2024). At the bottom of the scale compulsion is already routine: since May 2024 defended small claims for a specified sum of up to £10,000 have been referred automatically to the court's own mediation service, which the parties must attend on pain of costs or other sanctions (Practice Direction 51ZE). Roberts saw where this was heading, warning early that mediation drawn into the courts risked becoming an adjunct of adjudication (Roberts 1993; 2000) and concluding from his ethnography of the Mayor's and City of London Court that civil courts in England had become, above all, arenas for structured negotiation (Roberts 2013a). Consent and imposition are then not alternatives offered at different doors, but phases managed within a single institution, and Menkel-Meadow's observation of court-annexed mediation found the same blurring (Menkel-Meadow 1993: 372 n 72, 373, 375 n 82). A processual theory that starts from the full range should treat consent and imposition as variables running through all responses to trouble rather than as a binary sorting device. Menkel-Meadow's taxonomy already treats consent and compulsion as one dimension among several (Menkel-Meadow 2020: 409); what the poles add is a further axis that it does not accommodate: responses that claim neither consent nor authority.

Secondly, the poles show what the middle processes are for. Violence as non-negotiation and avoidance as non-engagement are both processes of closure: each redefines the relationship, the one as finished and to be settled by force alone, the other as not worth the cost of confrontation. Against that background the distinctive value of negotiation, mediation and even umpiring becomes clear: they keep the relationship open and presuppose procedural fairness and the possibility of compromise (Hampshire 1989: 74-75). This is the terrain of her "Peace and Justice", which recognizes that process is "the human bridge between justice and peace" (Menkel-Meadow 2006: 580), and of her later treatment of

peace as the necessary, if not sufficient, condition of human flourishing (Menkel-Meadow 2015: 7). The middle is not sealed off from the poles. Violence may be mixed into negotiation as a show of force (Palmer 2023: 50; Gulliver 1979: 137), or may open the way to talk, a raid or a strike precipitating a crisis in which other procedures can begin (Gulliver 1979: 1-2). The middle can also drift towards the poles from within: the low-intensity bargaining that the studies Menkel-Meadow reviewed found to predominate, with negotiators accepting whatever is good enough to close and producing outcomes that reflect neither what the parties need nor what they are entitled to (Menkel-Meadow 1993: 369-371, 377). This is a form of minimal engagement not far removed from avoidance. Apology deserves particular notice as a neglected process that runs through negotiation, mediation and umpiring alike. An effective apology recognizes the wrong done, accepts fault, expresses remorse and implies, if it does not state, that the conduct will not be repeated; one lacking these elements may deepen the very grievance it was meant to ease (Tavuchis 1991: 8, 36, 80, 121; Palmer 2023: 47-48). The practising lawyer treats it as a bargaining chip in "litigotiation" (Galanter 1984: 268), whereas disputants challenging an administrative body or a large business may value it above any financial settlement, and an early acknowledgement of wrongdoing may stop a dispute developing at all (Palmer 2023: 48-49; Palmer & Roberts 2020: 310). Hong Kong's Apology Ordinance 2017 accordingly protects apologies from being treated as admissions (Vines & Carroll 2018).

Thirdly, the poles test the presumption of choice on which process pluralism rests. The multi-door courthouse imagines a disputant choosing, with advice, the process that best fits the fuss (Sander & Goldberg 1994). Menkel-Meadow has herself questioned that picture, asking who chooses the process (Menkel-Meadow 2020: 407, 409 n 6) and now regarding the ideal of party choice as possibly overly optimistic (Menkel-Meadow 2024: 7, 17). The poles push the point further back. The decisive choices may well be made, or forgone, long before any courthouse is reached (Felstiner & Ors 1980-1981: 631, 636). Many of the homeless applicants in London studied by Patricia Ng never got beyond an unperceived injury: unaware of any entitlement, they could not name a grievance unless friends, relatives or a housing lawyer helped them to do so (Ng 2009; Palmer & Roberts 2020: 311-312). Grievance apathy, limited rights consciousness and structural violence together ensure that for many people the only "doors" ever encountered are lumping it and, at the desperate margin, counter-violence. The rural Chinese woman who killed her abuser had, in any meaningful sense, been offered no other process. Negotiation is

no easy remedy either, since disputes that cross lines of stratification will seldom be well resolved by bilateral means (Palmer & Roberts 2020: 139). Access to justice requires more than opening the middle doors more widely. It also requires an understanding of why the poles are so heavily used.

Fourthly, the poles bear on process design and practice, a field whose ethics Menkel-Meadow has done much to shape, through the CPR-Georgetown Commission on Ethics and Standards in ADR and in her writing on the ethics of ADR and of dispute system design (Menkel-Meadow 1997; 2009). Screening for domestic abuse in family mediation and careful handling of power asymmetry are now staples of the literature she helped to develop (Palmer & Roberts 2020: 321). The analysis here suggests that sound design must reckon with exit, where avoidance is the rational or the imposed response; with safety, where the shadow of violence distorts consent; and with prevention, where good design forestalls the dispute altogether. Roberts argued for a minimal form of intervention because the more active the intervener becomes, the closer mediation moves towards umpiring (Roberts 1986), and as ADR is incorporated into civil justice systems the value that matters most—that the parties themselves learn how to resolve and prevent their differences—may drop out of view (Palmer 2014a: 17-18, 43). Avoiding conflict and preventing violence are, moreover, usually desirable goals in their own right, and have generated their own practices and skills. William Ury sets alongside the resolving roles of mediator, arbiter, equalizer and healer a group of preventive roles (provider, teacher, bridgebuilder) and a group of containing roles (witness, referee, peacekeeper), each of which can be learned and taught (Ury 1999: 114-195, 200); de-escalation training and conflict-resolution education work in the same register. The PRC has made the goal an explicit object of policy. “Governance at the source of litigation” (诉源治理, *suyuan zhili*) is framed primarily as a means of reducing litigation and “dispute-derived” cases through front-end prevention and non-litigious resolution, but the SPC’s implementing opinions also make the prevention of civil disputes from turning into criminal cases one of its objectives, in risk screening and assessment and in marriage and family disputes alike (SPC Implementing Opinions 2021, paras 4, 15, 25). The qualification “usually” matters. Prevention may build capacity, but it may equally suppress grievance, as Nader’s critique warns (Nader 1990: 291; 2002: 43), and the Chinese programme displays the suppressive as well as the enabling form. Process design at the preventive pole must ask not only whether trouble has been forestalled, but whose grievances have been silenced along the way.

[F] CONCLUSIONS

Four claims have been advanced: that the poles of the processual range are processes in their own right and not merely its outer limits; that their neglect is rooted in the way legal scholarship constitutes its object; that attention to them shows process to be the link between a society's structures of conflict and its episodes of violence and avoidance; and that the processes along the spectrum are best understood as ideal types rather than as discrete alternatives. Empirically, the poles are seldom found pure: violence is displayed within negotiation, feuds are contained by mediatory machinery, prevention is built into consensus procedure, and low-intensity bargaining shades into avoidance, while the middle itself mixes consent with compulsion. Each type is a one-sided accentuation against which actual responses to trouble, typically compounds, can be measured (Weber 1949: 90); the continuum is a map of analytical possibilities, not a menu of doors. Seen from the poles, what negotiation, mediation and umpiring can achieve also comes into sharper focus (Palmer & Roberts 2020: 122). Several lines of inquiry follow. Collins's micro-situational model of violence awaits systematic cross-cultural testing against the anthropological record. The ethnography of prevention—of communities and practices that stop disputes arising, such as the Quaker Business Method or the early warning machinery of construction contracts—has barely begun. Apology merits sustained comparative treatment as a process in its own right, as do the skills through which conflict is avoided and violence prevented, and the conditions under which they enable and those under which they silence. The ways in which states channel grievances against themselves offer a demanding test of the processual-middle thesis, and the broader claim that process repertoires connect structure and situation deserves systematic development as a contribution which dispute resolution scholarship, long a borrower from the sociology of conflict, is now well placed to repay.

These are inquiries in the spirit of a scholar who has always looked beyond the adversary paradigm, learned from other disciplines and other societies, and asked of every process not only whether it resolves disputes but what kind of human relationships it makes possible. Faced with strong evidence that most negotiation is low in intensity and potentially inefficient, Menkel-Meadow chose to persist in a prescriptive vision of better lawyering (Menkel-Meadow 1993: 378). The study of the ends of the spectrum calls for a similar combination of realism and hope.

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Tracing the Roots of a Jurisprudence of ADR: Carrie Menkel-Meadow and her Intellectual Mother and Fathers

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"I like to look at the genealogy—where do these things come from?"
(Menkel-Meadow in Parra-Herrera 2025)

"That is all I am urging, that we try experiments in methods of resolving differences …"
(Follett 1941: 5-6)

"Ideas are incestuous. They commingle and refuse to sort themselves out so that one can say, 'These ideas are his or hers and those mine'."
(Raiffa 1982: v)

Abstract

This article traces the most significant intellectual influences of Carrie Menkel-Meadow, widely regarded as a pioneer in the field of alternative dispute resolution (ADR). It argues that key elements of Mary Parker Follett's approach to conflict resolution, Lon L Fuller's legal philosophy—particularly his work on alternative processes for handling disputes—and Howard Raiffa's negotiation theory are reflected in Menkel-Meadow's contributions to integrative negotiation, process pluralism, and her conception of negotiation as both an art and a science. The article examines these three theoretical pillars and concludes that one productive way to expand ADR's theoretical scope is to engage intellectual history and legal philosophy to better understand the field's development, its future directions, and to re-signify the past to open up new ways of thinking about ADR.

Keywords: ADR; negotiation; Carrie Menkel-Meadow; Lon L Fuller; Howard Raiffa; Mary Parker Follett; intellectual history; conflict resolution theory; genealogy.

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[A] INTRODUCTION

Although my research has been deeply influenced by Carrie Menkel-Meadow, I did not meet her in person until recently at the 2025 Association of American Law Schools Section on Alternative Dispute Resolution Works-in-Progress Conference at University of California (UC) Law San Francisco (formerly UC Hastings) on 24 October 2025. My work on the origins of Roger Fisher and William Ury's negotiation book, *Getting to Yes* (1981) was chosen for the plenary lecture, and she was one of the commentators. I was both excited and nervous. We had exchanged emails beforehand, and she had read my earlier work. Still, given her incisive eye, meticulous feedback, and deep knowledge of the intellectual history of alternative dispute resolution (ADR), I was unsure whether my methodological approach—drawing on intellectual history, legal philosophy, and pragmatism—would resonate with her, or whether she might view it as a dead end, or at least as terrain she had already explored and exhausted in her article, "The Fathers and Mothers of Invention: The Intellectual Founders of ADR" (Menkel-Meadow 2000) and her sequel book chapter "Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution" (Menkel-Meadow 2005).

Reading between the lines of these two foundational texts on ADR's intellectual history reveals a hypothesis that has shaped my work ever since I encountered it: the field of ADR is marked by a "foundational forgetfulness": the emergence of modern ADR has, in part, produced an amnesia among its practitioners and scholars regarding its pre-modern antecedents. In Carrie's words:

> When we think of the "founding" of the ADR movement (particularly, but not exclusively, in law), from when do we date it? Whom do we think of as our leaders? Many of us think of Frank Sander and the "multi-door courthouse" suggested by his famous paper, delivered at the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in 1976. For others, the publication of Roger Fisher and William Ury's *Getting to Yes*, signaled an interest in a changed paradigm for engaging in legal negotiations … Yet, as we date most of the modern "ADR movement" to the 1970s and 1980s, we may be failing to pay enough serious attention to earlier "intellectual" founders of ADR—those who provided the key ideas, concepts, or organizing frameworks from which we have built our modern movement of theories, practices, policies, and institutions (Menkel-Meadow 2000: 1-2).

The founding of modern ADR, either in its multi-door courthouse "big bang moment" (Moffitt 2006) or in its interest-based negotiation theory "revolution" (Fisher & Ury 1981) inaugurated a foundational forgetfulness

as if ideas, practices, and fields of knowledge had no antecedents and its roots had been thrown into the waters of Lethe, the underworld river in Greek mythology that erases memory. Informed partially by Carrie's work, I sought to resist this tendency toward forgetfulness by recovering intellectual traditions and ideas that were significant to ADR's emergence but were later overshadowed by more practice-oriented concerns, such as resolving disputes efficiently, managing emotionally strained parties, alleviating court congestion, and getting to "yes", however that affirmative goal was understood in a particular dispute.

At the plenary, next to Carrie (yes, she invited me to do so, and I started calling her Carrie at that moment), I presented my paper and explained why I believe ADR warrants a historically grounded and philosophically informed perspective. I offered a methodological account along the following lines, which I have incorporated into my written work:

> ADR is a field that tends to be excessively programmatic, concentrating on process design and refining professional skills. In important ways, its primary concern is the question of how to—*how to negotiate or mediate better*. This programmatic focus is useful and quite relevant. But in my research, I adopt a different lens. I also approach ADR and negotiation as an intellectual movement, recognizing and tracing the philosophical, historical, economic, political, and moral ideas that underlie and inform what otherwise appears to be a step-by-step, neutral set of techniques for managing, resolving, and preventing conflict (Parra-Herrera 2026).

Then it was her turn to comment on my paper. As I listened to her praises and critiques, I realized I was writing about events and people she had directly experienced and people she personally knew very well. Fisher, Frank Sander, and Howard Raiffa were to me dead authors and architects of the field I teach and research. But, for her, they were "people with projects" (Kennedy 2018: 6), that is, with intellectual, political, and economic agendas. They were mentors, colleagues, contradictors, and interlocutors. I was writing about the history of a field; she was one of its living repositories. I called for a historical turn to expand the field's possibilities; she could turn to her own biography to draw insights into how those possibilities had already been realized. What was history for me was biography for her. Memory and experience were side by side at that table.

John Dewey offers a helpful distinction between *experience had* and *experience known* (Dewey 1925). The former refers to the immediate, lived flow of experience—the kind we have as embodied beings immersed in the world as we navigate it. The latter refers to experience after our "pet owl Minerva" has taken flight (Kennedy 2003: 674), that is, experience

that has been intellectualized and processed through reflection. It is the kind of experience we have as rational beings, capable of stepping back from the world to understand it. I only had experience *known*; she had both experience *known* and experience *had*.

In her concluding remarks at the conference, Carrie offered a line that motivated me to write this chapter, expanded my approach to intellectual history, and helped me understand why approaching ADR as an intellectual movement remains a relevant endeavour. She suggested that my work could be distilled into the following question: how do we know what we know? This meta-epistemological inquiry is a modern variant of the Socratic imperative to examine one's life. Not knowing how we know what we know is one variant of "an unexamined life" (Plato 2002: 41).

There are many ways, however, to approach Carrie's Socratic question. One path, reflected in her own work and the one I will take in this paper, is to trace the ideas and intellectual influences that shape how we perceive, understand, and intervene in the phenomena we study. This approach asks how the lenses through which we interpret experience are themselves formed. Such an enterprise is bound to fail if we expect definitive or complete answers. However, if we understand intellectual genealogies as a way to partially illuminate why we see the world as we do and how those ways of seeing shape our thinking, then it becomes a valuable method for addressing how we come to know what we know.

This is exactly the aim of this article: to trace the most significant intellectual influences of Carrie, with the hope of shedding light on how she has come to know what she knows. Drawing on textual analysis, interviews, and conversations, I argue that her approach to ADR can be understood as a convergence of three key traditions: Mary Parker Follett's approach to conflict resolution, Lon L Fuller's legal philosophy—particularly his work on alternative processes for handling disputes (Fuller 1971)—and Raiffa's negotiation theory (Raiffa 1982). These influences are reflected in Carrie's contributions to integrative conflict resolution, process pluralism, and her conception of negotiation as both an art and a science.

I do not attempt here to recount the full range of Carrie's experience both *had* and *known*. Nor do I claim that Follett, Fuller, and Raiffa were her only intellectual forebears. Carrie's philosophy of ADR draws from a wide array of traditions, including the sociology of law, feminist legal thought, game theory, and deliberative democracy, as well as from thinkers such as Jon Elster, Jürgen Habermas, Stuart Hampshire, Émile Durkheim, Carol Gilligan, Soia Mentschikoff, Thomas Schelling, and Georg Simmel,

among many others. Yet, I do think that Follett, Fuller, and Raiffa have a special place in her intellectual constellation.

Other views on her intellectual fathers and mothers have been developed by her colleagues in the *Festschrift* volume dedicated to her in the *Texas A&M Law Review* (Welsh 2022), as well as in her own writings, interviews, and autobiographical essay, "When Should I Be in the Middle? I've Looked at Life from Both Sides Now", where she offered a candid account of how she came to know what she knows as a negotiator, mediator, and ADR scholar, including her early engagement with the question, in 1968, "What side was I on?" and her realization that she has been in the middle, an authentic and re-signified middle (Menkel-Meadow 2020a). I draw on insights and anecdotes from these sources. But my focus is rather on a dimension that, in my view, has received less attention: her intellectual and philosophical lineage—her "fathers and mothers". Carrie is often described as one of the "mothers" of ADR (Menkel-Meadow 2020a: 428). But who are her own intellectual predecessors?

In the first section, titled "The Experience", I will briefly chronicle some pivotal events that I argue were relevant to Carrie's intellectual formation. In the second section, I will analyse the ideas of Follett, a progressive era thinker considered one of the mothers of negotiation theory and management studies; Fuller, a Harvard Law School professor and prominent American legal philosopher, considered as "the jurisprude of ADR" (Menkel-Meadow 1997: 449); and Raiffa, a Harvard Business School professor and pioneer of game theory and decision analysis, also regarded as one of the founders of modern negotiation theory and the Program on Negotiation at Harvard Law School (Sebenius 2017). Then, I will briefly describe how Follett, Fuller, and Raiffa's ideas are crystallized in her integrative conflict resolution approach, process pluralism, and view of negotiation as both an art and a science. Finally, I will outline some lines of inquiry and questions for imagining a jurisprudence—or philosophy—of ADR.

[B] THE EXPERIENCE

Experience is the central concept of American pragmatism, a philosophical tradition that emerged in the United States in the late nineteenth and early twentieth centuries through the writings of Charles S Peirce, William James, Oliver Wendell Holmes Jr, Jane Addams, and others (Menand 2001). For pragmatists, experience is not merely a collection of sensory data. Experience is both a doing and an undergoing—an ongoing interaction between organism and environment. It is also the site where

ideas are clarified and where their practical consequences become visible (Peirce 1991: 169). This expansive conception of experience reconfigures the relationship between theory and practice, not as separate domains but as intrinsically connected, much like a hotel room is connected to the corridor that leads outside, into the world (James 2000: 28). What is the relevance of all of this? I argue that Carrie's approach to ADR is grounded in the pragmatist conception of experience, particularly in its insistence on the continuity between life and thought, theory and practice, and between experience had and experience known.

Our life experiences begin before we step into this world. Genetics is not the only bequest we receive from our ancestors. Our family genealogies and background inform, to some extent, our worldview. Carrie's grandfather was a peace activist in the First World War. In her words, "to that what we see, believe and think depends a great deal on where we come from" (Menkel-Meadow 2021: 300).

Her Catholic father and her Jewish mother fled to the United States during the Second World War, while her father's cousin served in the Nazi army (Verbeke 2016: 2). As Professor Alain Verbeke put it, as he introduced Carrie on the occasion of the receipt of her Honorary Doctorate in Human Sciences in 2016 in a ceremony at the Katholieke Universiteit (KU) Leuven, "she [was] no stranger to the ambiguity and multiple dimensions of conflicts. It entrenched in her an unflagging desire to heal the world" (Verbeke 2016: 2).

In an autobiographical article, Carrie traces her path into the field of ADR (Menkel-Meadow 2020a). She describes her student years as marked by conflict. In 1968, anti-Vietnam War student protests were reaching their peak on university campuses, Martin Luther King Jr and Robert Kennedy were assassinated, and racial tensions and social unrest intensified. At the time, she was an activist student at Columbia University, engaged in struggles for social justice while navigating a socio-political moment that increasingly called for dialogue to de-escalate conflict.

During the period of the Columbia University Student Protest of 1968, she found herself at the head of a citywide solidarity march, confronting Mike Sovern—a Columbia law professor who would later become Dean of the Law School and President of the University—and asking him: "Why couldn't we just all sit down and talk about it?" (Menkel-Meadow 2020a: 424). This moment captures a central tension in Carrie's trajectory: the oscillation between resisting unjust social structures through protests and civil disobedience and embracing the emerging belief that dialogue or some form of facilitation could serve as a vehicle for social change.

Unsurprisingly, after law school, she set out to pursue social justice through legal practice. She became a poverty lawyer, representing clients facing discrimination, poor prison conditions, barriers to education, due process violations, and welfare rights disputes. During this period, she experienced what she later described as her "real mediative epiphany" (Menkel-Meadow 2020a: 424).[1] In a discrimination case, she negotiated a settlement with a trucking company that secured a truck for her client who wanted to start his own business. As she reflects on this case, she felt that "a negotiated settlement was forward-looking and tailored to [the client's] needs, more than a litigated and more backward-facing judgment would have been" (Menkel-Meadow 2020a: 425). This experience revealed the possibility of a third path, a mediated path, beyond the binary of individual satisfaction and broader social transformation. By attending closely to her client's needs, a discrimination claim was addressed through creative forms of reparation. A past harm was reframed as a meaningful future, and a judgment focused on rights and wrongs gave way to a negotiation centred on needs and interests. And so, Carrie's journey into the field of ADR began. In her words, "I began to look for ways to 'solve the problem,' rather than 'win' the case." (Menkel-Meadow 2020a: 425) She started teaching negotiation and mediation first at the University of Pennsylvania, then the University of California at Los Angeles (UCLA) and Georgetown, and then at the University of California Irvine law schools, trying to change the legal culture and teach students to listen to both sides, examine needs and interests. 'My take", she argues:

> was a little different from Fisher & Ury's *Getting to Yes* focus on instrumental interests … and look for creative, value-enhancing, integrative solutions to legal and social problems that were both tailored to parties' particular needs and circumstances—but also to consider social justice outcomes and effects on third parties (thank you to Mary Parker Follett, 1995, conceptually) (Menkel-Meadow 2020a: 425-426).[2]

Carrie's "mediative epiphany" captures three foundational elements of her thought. First, it reflects her commitment to pursuing *integrative solutions* to legal and social problems. Integration becomes a guiding

[1] The notion of epiphanies as revelatory moments of experience appears elsewhere in Carrie's work. For instance, in her lesser-known article, "Genealogy of a Globalized Socio-Legal (and Feminist) Scholar", she invokes the idea of "Durkheimian epiphanies" to describe moments in which facts or observations are illuminated in ways that cast a different hue—or, perhaps, an alternative shading—on how law and legal institutions make sense of social phenomena (see Menkel-Meadow 1990; 2021b: 300).

[2] Here and in other writings Carrie often cites Follett's article "Constructive Conflict", published in 1925. The article originally appeared in Dynamic Administration, a posthumous compilation of some of her articles and lectures (Follett 1941).

principle for developing value-enhancing, context-sensitive, and stakeholder-responsive approaches to conflict. Second, it underscores the importance of tailoring both substantive and procedural solutions to the specific needs and circumstances of the parties. This entails imagining alternative procedures beyond the adjudicative model typically associated with courtroom litigation, an idea she later developed and coined as *process pluralism*. Third, it reconceptualizes negotiation as a problem-solving practice that extends beyond winning. In this view, negotiation requires creativity, attentive listening, and careful analysis. This idea later crystallized in her understanding of *negotiation as an art and a science*—an expression that stemmed from Raiffa's book, *The Art and Science of Negotiation* (1982).

Carrie recognized Follett as one of her intellectual mothers. Follett provided the vocabulary and conceptual framework necessary to transform this mediative epiphany into a lifelong practical and intellectual project: the exploration of ways to address conflict more productively. But what does "resolving conflicts productively"—a phrase coined by Follett—actually mean? According to Carrie, this means to create processes "to truly hear from each other in the hope that we can resolve our conflict, explore our differences, as well as complementarities, find mutual understanding, and achieve better outcomes and solutions to legal, social, and political problems" (Menkel-Meadow 2016: 10).

Carrie's pragmatic temperament led her to engage directly with the possibilities and limits of constructive conflict resolution across a wide range of settings. Her work has included founding and leading a mediation clinic at UCLA Law School, mediating major disputes such as asbestos insurance cases, serving as an arbitrator for the Internet Corporation for Assigned Names and Numbers in the domain name disputes panel, and consulting on dispute system design and internal conflict resolution processes for institutions such as the World Bank, the Federal Judicial Center, and the International Red Cross. The breadth of her practice reflects a defining feature of ADR since the 1980s and a defining trait of her own scholarship: the drive to design new processes and develop creative alternatives for addressing individual, collective, and transnational disputes more effectively.

[C] THE IDEAS AND THE PEOPLE

Mary Parker Follett: integrating through the law of the situation

Carrie was among the first scholars, alongside Albie Davis, Deborah Kolb, Richard Walton, Robert McKersie, and Pauline Graham, to position Follett as a foundational figure in negotiation, leadership and management studies.[3] Before their work, Follett appeared only briefly in Fisher and Ury's *Getting to Yes*, where she was credited with the well-known "library example" (Fisher & Ury 1981: xxii). Particularly, she placed Follett closer to the epicentre of ADR, portraying her as an early intellectual figure who embodied the field's creative, experimentalist, socially oriented, and integrative ethos. Follett emerged in Menkel-Meadow's writing as one of the "leading mothers of ADR" (Menkel-Meadow 2000: 7) and as a model for scholars, social workers, and activists seeking approaches to conflict resolution that moved beyond domination and compromise. In her words,

> Mary Parker Follett trained as a political scientist, then used her knowledge first in social work and then in organizational management and international affairs. She lectured frequently in personnel management contexts and was interested in how groups, using principles of democratic governance, could work together and produce better outcomes than hierarchically produced orders. Participation, constructive conflict, creativity, circular responses, and integrative behavior—the principles to which Follett devoted her life—are the touchstones of much of what we teach and hope to accomplish in good dispute resolution environments (Menkel-Meadow 2000: 7).

Follett reconceptualized several key ideas that later became building blocks of ADR discourse, namely constructive conflict, creativity, circular responses, and integration. Let's unpack each of them.

Follett rejected the view of conflict as inherently negative or as necessarily producing destructive outcomes, social friction, or violence. Instead, she introduced the notion of *constructive conflict* to emphasize that friction, difference, and tension are intrinsic to human experience and essential to growth, the development of more complex and effective social relationships, and the cultivation of creativity and innovation capable of imagining alternative forms of coexistence amid disagreement. Unsurprisingly, one of Carrie's favourite passages in Follett's work (and one of mine) is the following:

[3] This is the lineage of scholars who have recovered Follett from oblivion in negotiation theory and ADR, broadly construed: Walton & McKersie 1965 [1991]; Davis 1989; Graham 1995; Kolb 1995; Kolb & Ors 1995; Menkel-Meadow 2000.

> As conflict—difference—is here in the world, as we cannot avoid it, we should, I think, use it. Instead of condemning it, we should set it to work for us. Why not? What does the mechanical engineer do with friction? Of course, his chief job is to eliminate friction, but it is true that he also capitalizes friction. The transmission of power by belts depends on friction between the belt and the pulley …. The music of the violin we get by friction …. We talk of the friction of mind on mind as a good thing. So in business too, we have to know when to try to eliminate friction and when to try to capitalize it, when to see what work we can make it do. That is what I wish to consider here, whether we can set conflict to work and make it do something for us (Follett 1924: 30-31).

Follett understood that theorizing about conflict and practising any form of conflict resolution requires practical wisdom—or what Aristotle called *phronesis*: the capacity to discern the particularities of a situation and to determine how general principles should be applied, adapted, or reconsidered in light of a singular event. For this reason, Follett rejected rigid mandates such as "always eliminating friction" or "always working with conflict". The challenge, rather, is *to know when* one approach is appropriate and when another is required, *how* to treat this specific conflict, and which processes or practices to avoid. This capacity for discernment is the essence of practical wisdom. Such wisdom demands attunement to context, to the specific dynamics and demands of a given conflict, or what Follett described as "the law of the situation"—the task of discovering the order inherent in a particular set of circumstances (Follett 1941: 33–35).

To *know when* and *how* to address conflict, one must respond to the demands of the situation itself rather than rely on formulaic or *a priori* solutions. As Follett put it, we need to take "a conscious and responsible attitude toward experience" (Follett 1941: 44) instead of forcing experience into Procrustean concepts: a pragmatist theme.

This leads to creativity and improvisation because particular situations often exceed the categories and frameworks at our disposal for navigating conflict and dynamic human interactions. In this sense, negotiation and conflict resolution resemble a jazz performance. Musicians do not follow a rigid score dictating exactly when and how each solo should be played. Instead, they listen closely to the evolving melody, attend to the cues of fellow musicians, and preserve the coherence of the performance while contributing their own improvisations as part of a larger process of collective integration. Negotiation operates in much the same way: it requires reading the context, responding to the parties' needs, and

discerning when conflict should be mitigated and when it can be engaged productively to foster growth and transformation.

The analogy between negotiation and jazz is not accidental. In October 2004, the Program on Negotiation (PON) convened negotiation scholars, practitioners, jazz musicians, and improv artists for a seminar titled "Improv and Negotiation" to explore what it means to work in the moment and to respond within a largely unrehearsed process (Balachandra & Ors 2005). Being attentive and responsive to Follett's "law of the situation", or to the singular conflict at hand, opens the need for improvising in a disciplined way. This does not mean that negotiators, musicians, or improv artists lack an extensive repertoire of standards, riffs, techniques, and strategies to deploy when circumstances call for them. Rather, it means they must remain receptive, listen carefully, and attune themselves to the granularity of the context to intervene effectively. Professional sport is another example of this. As professional basketball player Shai Gilgeous-Alexander put it: "I have answers to the test, but I got to see the questions first" (Gilgeous-Alexander 2026).

Carrie participated in PON's seminar on "Improv and Negotiation" and, like other negotiation and mediation scholars and practitioners, such as Jeffrey Krivis (2006), Michael Wheeler (2013), and David Hoffman (2025), reflected on the relationship between jazz and negotiation. She believed that negotiation contains an important improvisational dimension. This, I believe, stems, wittingly or unwittingly, from Follett's insistence that conflict resolution requires responding to the "law of the situation" rather than imposing rigid epistemic or practical schemas onto what a situation reveals.

As Carrie and her co-authors observed, jazz players pay careful attention to the moment by listening carefully and watching for cues from others. Similarly, negotiators need to listen carefully and empathetically to what is revealed in a bargaining situation.

> We must acknowledge that negotiation is a dynamic and an uncertain process, one that defies rigid planning. We, thus, need to build a theory that is both rigorous and flexible and that reflects the reality that people learn and adapt as events unfold (Balachandra & Ors 2005: 422).

Creativity, therefore, does not merely consist in designing new negotiation frameworks, dispute-resolution procedures, or strategies for countering the moves of one's counterparts. Rather, it involves cultivating a different mode of listening and a new way of relating to phenomena—one in

which concepts emerge from experience, and in which the situation itself provides the guidance needed to work through conflict productively.

Follett understood that human relationships, particularly in contexts of conflict, are profoundly dynamic. Parties change as situations evolve, and their perceptions of one another and of the conflict itself shift accordingly. To capture this fluidity, she adopted the notion of "circular response", derived from the psychology of Edwin B Holt (Tonn 2003: 367-369). The concept emphasizes that human behaviour is more than a simple reflexive reaction to external stimuli. Human interaction is not linear or unidirectional; it is reciprocal, evolving, and continuously shaped through mutual influence.

In a passage that is at once cryptic and deeply insightful, Follett introduces the notion of circular response as the dynamic ontology governing human interaction:

> Through circular response, we are creating each other all the time … I never react to you but to you-plus-me; or to be more accurate, it is I-plus-you reacting to you-plus-me. "I" can never influence "you" because you have already influenced me; that is, in the very process of meeting, by the very process of meeting, we both become something different. It begins even before we meet, in the anticipation of meeting … response is always to a relating (Follett 1924: 58-63).

This passage offers an innovative way of conceptualizing human dynamics. Rather than imagining interaction as a causal relationship between two analytically distinct entities ("I" and "Thou", or "self" and "other"), circular response introduces a never-ending dynamic and an interdependent process in which organism and environment are continuously transformed through their encounter and mutual engagement. Follett's statement and hyphenated words—"I never react to you but to you-plus-me"—capture this integral logic of mutual constitution and modulation: human beings are constantly transforming and being transformed through the very process of relating to one another; they are a hyphenated unit.

This underlying ontology differs from the more traditional frameworks that emerged in ADR and negotiation theory after the 1980s. As I have argued elsewhere, Follett's ontology stands in sharp contrast to the individualistic analytic underlying Fisher and Ury's framework, in which negotiating parties seek to satisfy their individual desires by influencing one another, as though the negotiating self were fixed, isolated, and independent from both the environment and the other party. Follett's dynamic, interdependent, and integrative understanding of human beings offers a different ontological point of departure: a point from which a new

negotiation theory might be developed, beyond the mere satisfaction of individual preferences and desires (Parra-Herrera 2025).

As Follett explains:

> … we cannot watch the strikers and then the mill-owners. We cannot watch France and then Germany [thinking about the First World War]. We all know that the action of the mill-owners is changing daily, the action of the strikers, that the action of the strikers is affecting daily that of the mill-owners … The interweaving, which is changing both factors and constantly creating new situations, should be the study of the student of the social sciences (Follett 1924: 68-69).

Circular response thus ensures that individuals transform and are transformed by their interactions with others as new situations emerge from their encounters. The new situation introduces a new law to be discovered, enabling ways to integrate their differences.

According to Carrie, Follett's approach to human interaction also opened the way to thinking about complex networks of polycentric disputes and multi-party negotiation by foregrounding the strategic and interdependent dimensions of bargaining, where every action generates a reaction that, in turn, becomes a new action, triggering a new response or reaction. As Carrie argues, "Our actions and responses are all circular or interdependent in today's language." (Menkel-Meadow 2000: 9) Circularity, not causality, is the language of human interaction.

Follett refused to atomize individuals or fragment experience. Reducing human interaction to subject and object, or to stimulus and response, was akin to reducing music to a mere collection of sounds. She defended the unity of experience, even at the cost of conceptual neatness. As her biographer Joan Tonn observed, Follett saw herself as "merely articulating one of the oldest conceptions of philosophy—the unity of experience" (Tonn 2003: 371). Experience does not arrive in isolated pieces; it unfolds through an ongoing circle of responses in which human beings attempt, often imperfectly, to create integrative social relations where differences can (and likely will) coexist and generate something new, richer, and more complex than what existed before. Integration is what Follett called this inventive process and was her favoured form of conflict resolution.

For Follett, there are three principal ways of resolving conflict: domination, compromise, and integration. Domination occurs when one party imposes its will upon another. Compromise, by contrast, requires each side to surrender part of its demands in order to reach common ground, though what is sacrificed often remains latent and may later re-emerge as a new source of conflict. Integration offers a third path,

distinct from both domination and compromise. It seeks to create a higher functional unity by bringing divergent wills together to produce something new—something responsive to the demands of the situation at hand, whether in the context of civil war, diplomatic or labour negotiations, religious transitions, social revolutions, or national transformations (Follett 1942).

Integration was, for Follett—and, I will dare to say, for Carrie as well—the preferred mode of conflict resolution, provided that the "law of the situation" did not call for another approach. Integration did not require sacrifice or power-over, as compromise and domination did. As Carrie explains:

> [t]he likelihood of integrative solutions, in which parties do not necessarily have to give anything up, are increased by bringing differences out into the open, facing the conflicts and underlying desires, evaluating and re-valuing desires and preferences when the other parties' desires are made known, and looking for solutions in which the interests may fit into each other (Menkel-Meadow 2000: 8).

Looking for creative solutions as parties re-evaluate their desires and find new forms of association is the superior mark of integration over compromise.

In "Constructive Conflict", Follett (1941) insists that integration is not merely a matter of theorization, for shared understanding at the intellectual level does not, by itself, bring about genuine integration. For integration to succeed, parties must move beyond purely linguistic or intellectual engagement and participate together in a common activity. As Follett observes, "[d]isagreement disappears when theorizing ends and the question is of some definite activity to be undertaken" (Follett 1924: 18–19). For Follett, integration is not just something that occurs solely at the linguistic or dialogical level. It does not emerge simply because people are talking to one another; it requires shared action, a sense of togetherness, and a movement from an "I" consciousness to a "we" consciousness.

Follett, like Carrie, was at her core a pragmatist. She refused to separate theory from practice and understood that practice is the site where people's differences become interwoven into the fabric of their lives. Both Follett and Carrie recognized that understanding must be "knitted into the structure of one's being" (Follett 1924: 151).

Integration, then, represents a third way of addressing conflict—one grounded in invention, dynamism, co-participation, and the embedding of ideas within the lived experience of the parties themselves. Its aim

is not merely the satisfaction of individual interests, but the creation of broader forms of human association in which shared purposes can emerge without eradicating individual voices.

When I asked Carrie about Follett and her influence, she told me:

> I am a scholar. When I see a reference to something, I go deep, I dig deep to find it. So, I found some of her writings, and they just blew me away, because I loved everything about her. She was an early feminist. She went to Radcliffe … she was an interdisciplinary person. She became a sort of social worker and advisor to both labor organizations and management. I mean, she was a bridger. And I just jumped into all that stuff. (Parra-Herrera 2025).

Carrie did not say this explicitly, but I sensed that her encounter with Follett made her feel less intellectually lonely. Here was another woman working within her intellectual orbit, a creative and interdisciplinary woman who had coined powerful concepts such as constructive conflict, circular response, and integration, and who demonstrated that there was a way of life in which theory and practice, experimentalism and rigour, improvisation and discipline, could coexist and be fully lived.

"When you find that someone's put in writing some of the things that you have been thinking," Carrie reflected, "you realize you are not crazy to have these thoughts." (Parra-Herrera 2025) Encountering Follett and her ideas outside the field of law, she explained, "gave me the strength to want to use them, incorporate them, and put them into the legal scholarship world" (Parra-Herrera 2025). In this sense, Carrie became one of Follett's great translators into legal discourse and negotiation theory (Parra-Herrera 2025). Years later, when Carrie received an honorary degree from KU Leuven in Belgium, she concluded her remarks with a reference to Follett:

> Conflict may be inevitable (Mary Parker Follett once said, we need the friction of the bow on the violin to make music) but how we productively handle conflicts can be evolutionarily moved forward with our own innovations in dispute resolution design and practice (Menkel-Meadow 2016: 40).

From Follett's approach to conflict resolution and her dynamic ontology, Carrie continued her own journey of theorizing and inhabiting dispute resolution design. She understood that friction is necessary for music to emerge, but she also recognized that particular spaces and processes are needed for that music to be heard. It is here that process pluralism enters the picture, and with it, Lon L Fuller.

Lon L Fuller: the building blocks of process pluralism

Fuller is a household name in jurisprudence. His famous debate in the 1950s with HLA Hart over the nature of law and the relationship between law and morality marked a turning point in the history of legal philosophy. As Fuller's biographer, Robert S Summers, observed, the debate "was perhaps the most interesting and illuminating exchange of views on basic issues of legal theory to appear in English in this century" (Summers 1984: 10). Fuller understood law as a purposive activity that blends fact and value, what is and what ought to be. More importantly, he argued that regardless of the substantive ends legal rules pursued, they must satisfy certain formal requirements: they must be sufficiently general, publicly promulgated, prospective, clear and intelligible, non-contradictory, relatively constant over time, capable of being obeyed, and administered in accordance with their terms. According to Fuller, law possesses an inner morality, and, without it, law degenerates into something else (Fuller 1964). This inner morality is not satisfied merely by ticking the boxes of a procedural safeguard checklist. Rather, it articulates an ethos of lawgiving that respects the legal subject as an agent (Rundle 2012: 116-117). In short, social-ordering systems have integrity not just for themselves, but also because they respect the agents they govern.

Hart, by contrast, as a sociological positivist, understood law as a union of primary and secondary rules. Primary rules govern human behaviour directly. Secondary rules, in turn, are rules about primary rules; they address the uncertainty, inefficiency, and static character of a legal system based solely on primary rules. Thus, some secondary rules empower designated officials to create, modify, or repeal primary rules (rules of change). Others establish procedures for resolving disputes and determining whether conduct complies with primary rules (rules of adjudication). Still others specify the criteria by which a rule is recognized as valid and therefore part of the legal system (the rule of recognition) (Hart 1961).

For Fuller, law possessed an internal morality grounded in its purpose and in the respect it owed to the agents it governed. Hart, by contrast, was less concerned with the teleological, moral, and procedural dimensions of law and more focused on the analytical distinction between law and morality, as well as on the perennial question: how do we determine that *something*—whether a rule, custom, or practice—is law rather than some other form of command? Carrie was an heir of Fuller's jurisprudence. She was less interested in conceptual surgery (eg what is this as opposed to

that) and more concerned with the *telos* and practical consequences of forms of social ordering and legal processes.

Carrie embraced Fuller's central insight that process provides a window to justice, an access to the very structure of being. As Fuller puts it in an article capturing his pedagogical project:

> Life is itself a process, and by making process the centre of our attention, we are getting closer to the most enduring part of reality. For that reason, I believe that the recommended emphasis on procedures for solving conflicts will not tend simply to suppress those conflicts, but will promote their just solution. If we do things the right way, we are likely to do the right thing (Fuller 1948: 204).

Or to put it in Carrie's synthetic words: "process is the human bridge between justice and peace" (Menkel-Meadow 2006: 553).

The theoretical exploration of process, its internal structure, and its moral dimensions continued to evolve as the Fuller–Hart debate unfolded. In the late 1950s, Fuller prepared the first draft of "The Forms and Limits of Adjudication", a paper that later became one of his main contributions to the jurisprudence of ADR (Fuller 1978). As chronicled by his biographer, Fuller presented this essay at various venues, including the Legal Philosophy Discussion Group at Harvard Law School, the Association of American Law Schools, and the Harvard Faculty Workshop (Summers 1984: 10). He also distributed copies to his students in his jurisprudence classes, but it was not published during his lifetime. The most plausible reason for this is that Fuller planned to turn this article into a book, tentatively titled "Social Order" concerned with the conditions of good order (*eunomics*) and the inner morality of each ordering mechanism and workable procedure (Fuller 1978: 353). But the systematic project never ripened. All we have left are scattered interventions on the forms and moralities of different social-ordering mechanisms, including adjudication, mediation, collective bargaining, contractual agreement, and others.[4]

"The Forms and Limits of Adjudication" is perhaps Fuller's most significant illustration of the *eunomic* project and his jurisprudence of alternative forms of social ordering. In this article, Fuller weaves together three related lines of inquiry. The first concerns the forms and limits of adjudication itself: its essential elements, structure, and aims. The second seeks to distinguish adjudication from neighbouring processes that might be confused with it, including mediation, legislation, negotiation, executive

[4] Fuller's intellectual executor, Kenneth Winston, was Carrie's friend. They met in the late 1990s in a boat in the Galapagos. Winston compiled and published some of Fuller's unpublished manuscripts regarding the social ordering process (Winston 2001).

administration, and other modes of social ordering. The third raises the question of "what tacit assumptions underlie the conviction that certain problems are inherently unsuited for adjudicative disposition and should be left to the legislature [or other forms of ordering]?" (Fuller 1978: 354). Put differently, Fuller asks what factual and institutional conditions make it possible to apply a particular procedure or ordering mechanism to a given state of affairs or conflict. I refer to these, respectively, as the functional-structural, taxonomic, and fitting/barrier questions. To answer them, Fuller believed it both possible and desirable to define what he called "true adjudication", an archetype against which actual practices, variations, and deviations could be assessed. As Fuller explained: "It is only with the aid of this nonexistent model [archetype] that we can pass intelligent judgment on the accomplishments of adjudication [or other processes] as it actually is." (Fuller 1978: 357).

One could read Carrie's foundational article on legal negotiation theory (Menkel-Meadow 1984) as addressing these same Fullerian questions: what is problem-solving negotiation, and what are its essential elements, structure, and goals (the functional-structural question)? Indeed, in the section titled "Toward a Model of Problem-Solving Negotiation", she organizes her analysis around three dimensions: the underlying principles and goals of the model, its structure, and its process. She also distinguishes problem-solving negotiation from other forms of negotiation, particularly the adversarial model (the taxonomic question). Finally, she addresses the limits of problem-solving negotiation and identifies the circumstances in which it is, or is not, appropriate (the fitting/barrier question). As Carrie observes regarding the last line of inquiry, "[t]here clearly are occasions in legal negotiation when problem solving will not solve all problems" (Menkel-Meadow 1984: 840).

Another foundational contribution Fuller made to ADR, which also appears throughout Carrie's work in different forms, was his analysis of the two basic modes of social ordering. According to Fuller, human beings organize their conduct either through "organization by common aims", in which individuals pursue shared objectives through cooperation, or through "organization by reciprocity", in which individuals pursue different objectives and engage in exchange or reciprocal arrangements so that each may obtain what they want (Fuller 1978: 358). Underlying this distinction is a deeper question about human nature and social life: are we beings inclined to join with others in pursuit of common purposes, even at the risk of subordinating some of our individual interests, or are we fundamentally self-interested actors seeking from others the missing pieces in the endless puzzle of human wants? Carrie often turned to Ian

McEwan's literature to dramatize this tension and paradox of human existence, the tension between association and reciprocity (exchange), altruism and egoism, collectively-oriented and self-centred (Menkel-Meadow 2020b: 235).

If association and reciprocity are the two fundamental forms of human ordering, Fuller argued that each can vary along a spectrum from informality to formality. Reciprocity, for example, may range from informal and tacit patterns of behaviour to highly formalized contractual arrangements (Fuller 1978: 357–358). Likewise, organization by common aims can extend from informal cooperation on a shared task to the creation of formal political associations or nations organized around collective goals. The interaction between these modes of social ordering and varying degrees of formality gives rise to a wide spectrum of legal processes and institutional arrangements as different from one another as a contract is from a customary practice, or an informal joint venture from an international confederation. The possible combinations are virtually limitless.

Building on this intuition, Fuller began to theorize the broad spectrum of procedures, dispute-resolution mechanisms, and decision-making processes available to lawyers, institutional architects, and policy designers for channelling reciprocity and association into stable forms of social ordering. Each form possesses its own integrity, internal morality, and structure.

For Fuller, a process ceases to be true adjudication when its defining features are undermined. If a party cannot present evidence or is denied the opportunity to offer reasoned arguments and counterarguments capable of influencing the decision maker, adjudication becomes distorted and degenerates into something else (Fuller 1978: 364). At the same time, the institutional setting and governing rules shape the specific form adjudication takes. When the decision maker is a judge operating within the court system, and the process is governed by the Federal Rules of Civil Procedure, adjudication takes the form of courtroom litigation. When the process occurs within another institutional setting, is governed by the Federal Arbitration Act, and the third party is an arbitrator, adjudication assumes the form of arbitration. Both the integrity and the combinatory nature of each process enabled process pluralism and creative institutional design.

Fuller extended his analysis beyond adjudication to other forms of social ordering and legal processes, including legislation, mediation, administrative direction, contractual agreement, and customary law.

Among these contributions, his essay "Mediation—Its Forms and Functions" became especially influential within ADR scholarship (Hinshaw & Ors 2021: 101-123). For Carrie, particularly, there is one quote from Fuller's text that appears repeatedly in her work:

> [T]he central quality of mediation [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another (Fuller 1971: 325).

Like adjudication, mediation possesses its own form, integrity, morality, and defining essence. Unlike adjudication, however, mediation is not a process centred on the presentation of evidence and reasoned argument before a third-party decision maker. Rather, it presupposes an ongoing relationship of interdependence between the parties and seeks either to enhance, preserve, transform, or terminate that relationship. The power of mediation derives not from the force of legal arguments or the weight of evidence, but from the parties' relationship itself. For Fuller, mediation may function either as a norm-generating process, in which parties create new norms to reorient their relationship, or as a norm-releasing process, in which parties free themselves from rigid legal rules in favour of trust, mutual respect, and shared understanding (Fuller 1971: 325–336). In either case, mediation operates through the reconstruction of relationships rather than through authoritative judgment. As Nancy Welsh later observed in her commentary on Fuller's essay, mediation "enables rules to emerge organically from relationships" (2021: 115).

The implications of Fuller's argument about the forms and limits of adjudication are significant. First, it generates an evolving taxonomy of social-ordering forms. At the most fundamental level are reciprocity and association, which are largely determined by the alignment of individuals' desires and objectives. When interests converge around shared purposes, association becomes the appropriate mode of social ordering; when interests diverge, reciprocity and exchange emerge as the dominant organizing principle.

Fuller then develops a second typology based on the mode of participation available to those affected by the process. If parties can negotiate the terms governing their relationship, a contract becomes the appropriate form of social ordering. If participation occurs through voting, elections provide the relevant mechanism. If parties can present evidence and offer reasoned arguments before a neutral third party, adjudication becomes the appropriate process. It's all about fitting the right social-ordering mode to the needs of the situation (or, should I say, "the law of

the situation"?). This classificatory exercise can be extended indefinitely. In "The Forms and Limits of Adjudication", Fuller focused primarily on adjudication (1978), but he conducted similar analyses of collective bargaining, lotteries, mediation, managerial decision making, and other forms of social ordering in other writings. These modes of social ordering can thus be organized according to a variety of criteria, including the alignment of interests, forms of participation, degree of formality, number of parties involved, institutional goals, and decision-making structures, and so on.

Second, each form of social ordering possesses its own essence, integrity, and normative meaning. This integrity ensures that a process remains true to the form of ordering it purports to embody. Adjudication, for example, ceases to function as genuine adjudication when its conditions are not met. As Fuller explains, adjudication "loses its meaning if the arbiter of the dispute is inaccessible to reason because he is insane, has been bribed, or is hopelessly prejudiced" (Fuller 1978: 364). Or it loses its meaning if participants are incapable of offering reasons and proofs to justify their needs, interests, and rights. In such circumstances, the process metamorphoses into something other than adjudication.

Third, Fuller recognized that every process and form of social ordering rests upon particular philosophical and anthropological assumptions about human beings and their relations with one another. Elections, contracts, and adjudication are possible only if human beings are understood as free and purposive agents, capable of reciprocity, association, persuasion through reason, democratic participation, and the formation of mutual agreements. "Adjudication", Fuller argues, "is a device which gives formal and institutional expression to the influence of reasoned argument in human affairs." (Fuller 1978: 366) Procedures and institutions of social ordering are therefore not merely technical mechanisms; they are institutional expressions of fundamental human capacities and needs. Human temperaments are therefore embodied in institutional designs.

Finally, Fuller inaugurated a specialized jurisprudence devoted to social ordering and to the alternative processes through which disputes are managed, human behaviour regulated, and conflict addressed. In doing so, he articulated many of the foundational questions of ADR jurisprudence, including those concerning the function, structure, limits, and underlying assumptions of dispute-resolution processes—or what Carrie aptly described as "the functional and moral integrity of dispute processes" (Menkel-Meadow 2000: 13). As Carrie observed, Fuller

"argued that each dispute resolution process has its own particular function, purpose, morality, and integrity". Indeed, "in many ways, Lon Fuller remains the only legal philosopher to take theorizing about dispute resolution seriously" (Menkel-Meadow 2000: 13).

Carrie's famous statement that Fuller is "the jurisprude of ADR" (Menkel-Meadow 1997: 449; Menkel-Meadow 2000: 4) is not an overstatement at all. Quite the opposite, Fuller inaugurated a distinct way of thinking about ADR, decision-making, problem-solving, and social ordering that filtered into Carrie's idea of "process pluralism" (Menkel-Meadow 2006: 554). In her words:

> For Fuller, each process of decision-making, or as he preferred to say, "problem solving" had its own logic, morality, and function. Fuller acknowledged that not all legal disputes or social problems were similarly structured … (Menkel-Meadow 2000: 16-18).

Fuller's main point is that processes and disputes were not monolithic or similarly structured. ADR scholars need to theorize both the processes for handling disputes and the disputes themselves, which can adopt a wide range of forms. Therefore, the process variations, phenomenological appearance, and modes of relation are the building blocks of ADR jurisprudence in Fuller's philosophy. This, I believe, got translated into Carrie's capacious work on the modes of conflict resolution and her idea of process pluralism, that is, that "'one size does not fit all' needs of disputants in our complex world, new forms of hybridity, variation and mixed processes may enhance human problem solving" (Menkel-Meadow 2020b: 407).[5]

More specifically, Carrie extended Fuller's combinatory approach to forms of social ordering by intersecting them with different modes of discourse. Disputing parties, she argued, may communicate through reasons, universal principles, and rights (principled discourse); through interests, preferences, reciprocity, and compromise (bargaining discourse); or through needs, emotions, and values (passionate or affective discourse) (Menkel-Meadow 2011: 9). According to Carrie, the forms of process themselves may also vary along multiple dimensions: they may be public or private, undertaken collectively or by representative subgroups, led

[5] Process pluralism, for Carrie, stems from her core belief that "new processes of human engagement, including reason, principle, fair bargaining, passions, and moral and emotional empathy, will be necessary for us to solve new (and old) human problems so we can live together in peace, with justice" (Menkel-Meadow 2006: 554). Process pluralism, thus, moves beyond Sander's idea, derived from Maurice Rosenberg, of the "multi-door courthouse" and coins a more dynamic, fluent, and hybrid metaphor of a hybrid house spacious enough to host "all forms of productive and peace-seeking engagement" (Menkel-Meadow 2006: 569).

by experts or laypersons, permanent or temporary, and so forth. The interaction between modes of discourse and forms of process generates a wide variety of decision-making and dispute-resolution mechanisms (Menkel-Meadow 2011: 9).

Carrie later expanded process pluralism by incorporating a cultural perspective into the modes of conflict resolution. Some cultures, she observed, privilege appeals to reason and principled discourse, while others are more pragmatically oriented toward interests, compromise, and bargaining. In this respect, her typology extended Fuller's theory of social ordering into domains Fuller had largely left unexplored, including forms of communication and cultural sensibilities.

More importantly, however, Carrie identified what she saw as a central limitation in Fuller's account: his conception of social ordering, together with the forms, integrity, and limits of dispute processes, seemed to presuppose an allergy to hybridity in dispute resolution. Unlike Fuller, Carrie opened up a jurisprudential question that Fuller had largely treated as settled: "Is process variability a good thing; or should we, as Lon Fuller suggested, keep to 'pure' forms of party negotiation, conciliation, facilitated decision making through mediation, or commanded decisions in arbitration and adjudication?" (Menkel-Meadow 2020b: 417) Her answer marked a significant shift in ADR discourse—one that has yet to fully permeate ADR practice. In short, Carrie charted a new line of inquiry that moved away from a predominantly *taxonomical jurisprudence of ADR*, focused on identifying the principal forms of social ordering and asking whether each of Fuller's "basic" processes possessed its own moral identity or "integrity" (Menkel-Meadow 2006: 569). In its place, Carrie advanced a more *hybridized jurisprudence of ADR*, grounded in the affirmative response to the question: "[c]an processes be combined and hybridized to meet modern varieties of decisionmaking and political choice?" (Menkel-Meadow 2006: 569)

Fuller's emphasis on procedural integrity, however, was deeply influential for Carrie. Yet she increasingly explored the liminal spaces between processes, the hyphenated processes, the yet-to-be-born processes. She also explored the ethical commitments embedded within different procedures, the cultural sensitivities that shape process selection, the scripts human beings use to navigate difference (eg reasons, interests, needs, and passions), and the continual experimentation through which new procedural forms and institutions emerge by combining existing ones. In this sense, Carrie, as the pragmatist thinker she is, developed new ways of thinking about procedure from Fullerian premises.

Carrie understood that the question of which procedures to endorse and which to reject cannot be settled *a priori*. In her view, it is difficult, if not impossible, "to specify in advance criteria for allocation to particular processes" (Menkel-Meadow 1995: 2668). The modern world, moreover, is different from—and in many ways more complex than—the world Fuller confronted. As a result, meaningful experimentation today requires moving beyond pure procedural forms to develop hybrid models responsive to the existing conflicts and social contexts.

Even though Carrie explicitly criticized Fuller for his rigid functionalism, limiting the possibility of hybridizing procedures to preserve the purity of adjudication, mediation, and other legal processes (Menkel-Meadow 2000: 18), she recovered an important legacy from his legal philosophy: the idea that lawyers should serve as process architects, rather than merely practitioners of legal rhetoric, hermeneutics, and advocacy. "For Fuller," she observed, "the lawyer's role was to be a social structure or process 'architect' whose job was to consider questions of 'appropriate' (as we say today, rather than 'alternative') institutional design" (Menkel-Meadow 2006: 563). Lawyers, in this view, need to be cognizant of the repertoire of procedures available to govern human conduct and resolve human conflicts arising from reciprocity and association.

When I asked Carrie about Fuller's impact on her work, I realized that her affinity with Fuller had another dimension that I had overlooked: Fuller and Carrie were not just ADR jurisprudes; they were ADR practitioners. Both practised what they theorized, though they did so in profoundly different intellectual and historical worlds. Fuller practised in a world searching for coherence, order, and conceptual clarity. He served as an arbitrator, negotiated collective bargaining agreements, participated in mediations, and even appeared before the War Labor Board (Summers 1984: 7). Carrie's world, by contrast, emerged within the dialectic between modern and postmodern sensibilities (Wellmer 1991). It was a world marked by fluidity, fragmentation, deconstruction, and paradox, even as it continued to long for unity, coherence, and universal principles. This transformation in the spirit of the age, I believe, produced a fundamental difference in their respective conceptions of process pluralism.

Fuller was, in many respects, the proto-architect of the multi-door courthouse and of ADR functionalism. He maintained that each process possessed its own morality, integrity, and form. Carrie, by contrast, became the architect of ADR hybridization. She imagined, and built to large extent, a "house of justice and peace" (Menkel-Meadow 2006). She argued that experimentation in a complex and unstable world would

inevitably generate mixed forms of conflict resolution, including med-arb, dispute systems design, consensus building, judicial dispute resolution, and transitional justice mechanisms in which adjudication, mediation, neutral evaluation, truth-telling, restorative justice practices, and even forgiveness might be combined, sequenced, and integrated into a single institutional framework.

Sander once told Carrie, as they walked through Mount Auburn Cemetery near Fuller's grave, that she ought to have a conversation with Fuller. As Carrie later recalled:

> I have taught and practiced, like Fuller did, every part of ADR. I have been a major arbitrator. I was a mediator for years in the asbestos [case] and billion-dollar insurance cases. I was a poverty lawyer at the beginning, so I felt a kinship with Fuller, because although he's a very fancy jurisprudent philosopher, he did all of it … He was also a practitioner, so he brought both a philosophical and a practitioner's eye to [ADR]. And I would have these good conversations with Frank Sander whenever I hung out [at Harvard] to teach something. And so, Frank walked me to Fuller's grave in the cemetery in [Cambridge]. And, he was so cute, and he said, "I think you want to have a conversation with Lon. I think you're beginning to make an argument that there's a different integrity or logic when things get combined" (Parra-Herrera 2025).

I imagine Carrie strolling with Sander—himself deeply influenced by Fuller—and receiving that advice as they walked along the beautiful paths of Mount Auburn Cemetery, as though the roads already taken in ADR, the paths most travelled, and the new roads yet to emerge all coexisted in that very place. Across generations, one element endured: a commitment to pluralism, experimentation, and innovation. They were all, in one way or another, architects of process. But Carrie also possessed a scientific temperament. Metaphorically speaking, she was both an architect and an engineer of process. Like Howard Raiffa, she valued empirical inquiry, quantitative analysis, and formalizations in negotiations and other dispute resolution processes.

Howard Raiffa: introducing numbers in negotiations

Howard Raiffa is a household name in business negotiation, game theory, risk analysis, and decision sciences. His influential book *The Art and Science of Negotiation*, published in 1982, transformed the field of negotiation as profoundly as other classics, such as *Getting to Yes* (Fisher & Ury 1981). In fact, Raiffa considered titles such as *Before Getting to Yes* and *Beyond Yes*, signalling both a tribute to Fisher and Ury's work and a desire to distinguish his own approach. These alternative titles

suggest that his ideas both logically precede interest-based negotiation and extend beyond its central precepts.

Ultimately, *The Art and Science of Negotiation* emerged from the convergence of game theory, principled negotiation, lessons drawn from a decade of teaching competitive decision-making at Harvard Business School (Raiffa 1982: v), and Raiffa's own experiences as a negotiator and institution builder. Methodologically, as Jim Sebenius has put it, Raiffa's approach yoked "*a priori* prescriptive theory to the theoretical and empirical work of behavioral scientists who rigorously described and accounted for actual behavior" (Sebenius 2017: 289). In other words, Raiffa's negotiation analysis is targeted at how negotiators *should behave* based on how people actually behave.

Raiffa's contributions to negotiation theory and, more broadly, to conflict resolution, span practical innovations in institutional design, theoretically rigorous insights, and pioneering pedagogical approaches for teaching decision science and negotiation in business and public policy schools. On the educational front, Raiffa co-founded the John F Kennedy School of Government, now known as the Harvard Kennedy School. He also held the Frank P Ramsey Professorship of Managerial Economics, a joint appointment between Harvard Business School and the Harvard Kennedy School that reflected his deep commitment to interdisciplinary scholarship and practice. The Frank P Ramsey Chair is one that he selected himself after obtaining the approval of Ramsey's widow. Ramsey (1903–1930) was a largely forgotten genius in philosophy, economics, and mathematics. He is known for translating Ludwig Wittgenstein's *Tractatus Logico-Philosophicus*, contributing to the development of subjective probability theory—which interprets probabilities as numerical representations of an individual's degrees of confidence—and, importantly, helping to bridge analytical philosophy and pragmatism (MacBride & Ors 2025).

From a practical and institutional-building standpoint, Raiffa played a key role in negotiating the creation of the International Institute for Applied Systems Analysis (IIASA), an initiative inspired by President Lyndon Johnson's question of whether the Soviet Union would be willing to join the United States and other countries in collaborative research on complex global challenges, including energy, transportation, urban development, water resources, and hunger (Raiffa 2011: 90). More than a multilateral research institution, IIASA was an experiment in building infrastructure for cooperation (perhaps a rudimentary form of integration) between Cold War adversaries deeply suspicious of one another. It sought to create a space in which practices of collaboration, knowledge generation, and

information sharing could emerge despite profound geopolitical tensions. In Raiffa's recollection:

> [I]t would make good sense if IIASA-like regional institutes could be created in various sensitive regions of the world, institutes that would be nongovernmental and somewhat buffered from today's realities; that would work on idealistic solutions of tomorrow's problems; that would induce political antagonists to work side by side on joint problem-solving tasks that are not politically threatening (Raiffa 1982: 342).

IIASA is a paradigmatic example of what Gabriela Blum calls an "island of agreement" (Blum 2007), or what Raiffa described as a buffered negotiation space between adversaries who must cultivate the practice of joint problem-solving even when their respective constituencies remain locked in entrenched conflict or war. The process of negotiating, designing, and leading IIASA became, for Raiffa, a cross-cultural negotiation laboratory (Raiffa 2011: 127). This experience ultimately redirected his intellectual focus from statistical decision theory to negotiation theory, shaping the trajectory of his later contributions to the field. Like Carrie, Raiffa's journey to negotiation began elsewhere, suggesting that there is no straight line into the field; one either stumbles into it or is called to it.

Raiffa's negotiation theory was deeply informed by game theory, a field in which he contributed to establishing. In his autobiography, he recalls being invited to give a seminar at Princeton University during the 1950–1951 academic year, when some of the leading figures in game theory were teaching or visiting there. After his presentation, someone suggested that he collaborate with John Nash, who had been in the audience. Raiffa, however, was discouraged when another colleague warned him that "[Nash] was a strange person and not a collaborator" (Raiffa 2011: 32). As a result, the two never worked together.

Even if they could have worked together, their intellectual interests within game theory diverged. Whereas Nash became primarily associated with the strategic interactions between players, Raiffa was, especially in the early stages of his career, less interested in the bilateral dimensions of decision games than in the role of third parties. He framed his central concern as follows: "If two players of a non-zero-sum, abstract game asked me to act as arbitrator and to determine a joint outcome for their dispute, what would I do?" (Raiffa 1982: 1)

This concern with third-party intervention also shaped his approach to negotiation analysis. Raiffa devoted considerable attention to what he called "external helpers": facilitators who structure deliberative processes; mediators who organize negotiations without participating in

the substance of the dispute; arbitrators who evaluate a conflict and impose what they regard as a fair resolution; and "neutral joint analysts", who "use analytical thinking to help resolve negotiation disputes and deals" (Raiffa 2011: 176). In other words, Raiffa was not a dyadic thinker; he was concerned about the number of people involved in negotiation as a key analytical unit to rethink negotiation principles and practices. A negotiation is dramatically different when there are two parties, two parties and a neutral, or three diverging parties with no neutral. Numbers matter. Both to quantify negotiation analysis and to think more broadly about how numbers (eg parties, issues, agents, criteria) modulate negotiation analysis.

When I asked Carrie about her intellectual influences, she immediately identified Raiffa as one of the most important. Many scholars who entered the fields of negotiation or ADR in the 1980s point to Fisher for *Getting to Yes* or to Sander for his (often misattributed) "multi-door courthouse" concept. "For me," Carrie explained, "it was Howard Raiffa. He was just … the nicest man. I have a picture of him and me at my office up here" (Menkel-Meadow 2025).

Over the years, Carrie and Raiffa met on numerous occasions and frequently exchanged ideas about the analytical dimensions of negotiation. She first encountered his work shortly after the publication of *The Art and Science of Negotiation*, a book that profoundly shaped her thinking. "It gave me a hook to what I was doing in the classroom," she recalled. "It was very rigorous" (Menkel-Meadow 2025). The book offered a conceptual and analytical framework that enabled her to connect her teaching practice to the emerging field of negotiation scholarship.

In the spring of 1981, Carrie was a visiting professor at Harvard Law School, where she joined Raiffa and Lawrence Susskind, an MIT scholar of environmental disputes and negotiation, in a seminar group on negotiation. Together, they explored Raiffa's idea of organizing a conference on the role of numbers in negotiation and other multi-party negotiation pedagogical and practical issues (see eg Susskind & Ors 2005). The underlying question left a lasting impression on Carrie. As she recalled, "Raiffa was just so influential to me because I could never stop thinking about … what difference do the numbers make, both in terms of parties, but also issues." (Menkel-Meadow 2025)

In other words, Carrie received from Raiffa something that Fuller—and perhaps Follett—did not explicitly articulate in their own approaches to ADR and conflict resolution: the idea that the number of issues under consideration and the number of parties involved significantly shape how

one conceptualizes negotiation and the appropriate dispute resolution process. Numbers matter.

In Carrie's *Negotiation: A Very Short Introduction*, a work that despite its prolegomenic title is one of the best distillations of her own work in negotiation, she explains what implications follow and research questions opens up when the number of parties is foregrounded, after all "in reality many, if not most, negotiations have more than two parties" (Menkel-Meadow 2022: 39). For instance, some negotiation dynamics add a level of complexity when parties have agents (ie lawyers, brokers, representatives) which not only reveals a new tension in negotiations (Mnookin 2004), but additionally complicates the communication by introducing the problem: what to disclose and what not, or what requirements should be met to reach agreements. Additionally, some negotiations are multi-party negotiations, which, in turn, surface another set of problems and research avenues: when is an agreement reached? How are coalitions formed and disintegrated? What vetoes are acceptable? And who can speak for whom? For how long and when? (cf Menkel-Meadow 2022: 39).

If, in addition to a negotiation being a multi-party negotiation, the parties themselves are groups rather than individuals, another layer of complexity emerges. In such cases, negotiations occur not only between parties but also within the groups themselves, creating both *inter*- and *intra*-party bargaining dynamics. This raises an important theoretical question: do we need a single negotiation theory capable of accounting for both levels of interaction, or do inter-party and intra-party negotiations require distinct analytical frameworks?

In short, negotiations can be dyadic or multi-party, agent-led or self-led, individual-based or group-based, or any combination of these. Each configuration presents its own challenges and should prompt us to rethink prevailing negotiation frameworks. There is no one-size-fits-all model of negotiation. As Raiffa recognized, numbers matter.

A similar insight emerges when attention shifts from *who* is negotiating to *what* is being negotiated. Here, too, numbers matter. Single-issue negotiations tend to be distributive, with gains for one party often coming at the expense of the other. By contrast, multi-issue negotiations create opportunities for value creation, trade-offs, and the generation of mutually beneficial options.

Numbers also matter in relation to the criteria parties use to evaluate proposals and justify outcomes—a less-developed topic in negotiation theory. It is one thing to negotiate a dispute in which the parties rely on

a single objective criterion, for example, what a court is likely to decide if settlement efforts fail. It is quite another to negotiate in a context where multiple objective or intersubjective criteria are plausible and compete for legitimacy. As the number of relevant criteria increases, negotiation dynamics become more complex and potentially agonistic. Parties may disagree not only about outcomes but also about the standards used to manage disagreements or split the difference. Under such circumstances, a third party may be necessary to assess, reconcile, or choose among competing criteria. Again, numbers matter, and this is the main lesson that Carrie took away from Raiffa.

At this point, I must confess that I did not expect Raiffa to emerge as one of Carrie's principal intellectual influences. Since speaking with her, however, I have reflected on her answer and come to appreciate another dimension of Raiffa's thought that resonates deeply with her understanding of negotiation: the idea that negotiation pendulates between, or perhaps more accurately sits at the intersection of, science and art.

This means that negotiation can be studied much like other scientific phenomena. Negotiation laboratories can be designed and operationalized to test hypotheses, challenge existing knowledge, and develop paradigms that help explain how people negotiate and how they should negotiate. In this sense, negotiation is a field open to falsification, experimentation (Popper 1959), and what Raiffa called "systematic analysis" (Raiffa 1984: 8). It generates predictions that future observations may corroborate or refute, and those predictions become the building blocks of an architecture for inhabiting the terrain of human strategic interaction, revealing how individuals and groups pursue their interests and create arrangements in which competing desires can coexist.

In the introduction to *The Art and Science of Negotiation*, Raiffa explained:

> When I returned to Harvard in 1975, I decided that my primary aim was not to teach what I had learned, but rather to learn what I should be teaching in the art and science of negotiation … My idea was to create a quasi-laboratory where students would at the same time be willing subjects in experiments, be interpreters of the empirical findings, and be designers of modified experiments that could be tried with new groups of subjects. Collectively we could test what worked in the laboratory and we could discuss whether our heuristic insights would be applicable in the real world. (Raiffa 1984: 8).

Raiffa's vision reveals a distinctly scientific temperament. He approached negotiation as a field of inquiry to be explored through experimentation,

observation, and systematic analysis. Negotiation is a science insofar as its effective practice requires a coherent and comprehensive framework for understanding and addressing key questions such as:

> What are your alternatives? What are your objectives? How do your objectives conflict? What are your value tradeoffs? What are the primary sources of uncertainty that you face? What objective data do you have that bear on these uncertainties? How can you tap the knowledge of relevant experts, and what are their biases? Can you defer action and accumulate further information before you commit yourself? (Raiffa 1984: 358)

In a similar vein, Carrie's scientific questions of negotiations are:

> (1) Is the *res* [what is negotiated] divisible, sharable, scarce? (2) Do the parties know each other, and are they "repeat players" or "one-shooters"? (3) How many parties are there? (4) How many issues are involved? (Menkel-Meadow 2022: 10)

In this respect, Raiffa shared with Carrie a scientific mindset committed to testing assumptions, generating knowledge through controlled inquiry, and continuously refining theory through practice. Both encouraged negotiators to approach every negotiation by asking a set of fundamental questions. In both Raiffa's and Carrie's formulations, these questions provide a conceptual map for navigating the complexities of different negotiation contexts.

But science is not enough. Negotiation also draws from another language game and way of life. Negotiation is an art as well. It is creative, rooted in practical wisdom, allergic to universal rules, and faithful to specific events and contexts. For Raiffa, the art of negotiation, however, had a very specific meaning, one that includes "interpersonal skills, the ability to convince and be convinced, the ability to employ a basketfull of bargaining ploys, and the wisdom to know when and how to use them" (Raiffa 1984: 8). Negotiation is an art because it taps into the human potential to listen, communicate, persuade, influence, facilitate, mediate, and, more importantly, be mindful of the singular context one is trying to intervene in. Knowing when and how to intervene in negotiation is not a question that science alone can resolve. As Kenneth Sharpe, a political theorist working on *phronesis*, put it: "Choosing how to balance competing goods and determining how and when to act in ambiguous, uncertain, and contradictory situations is the kind of ethical decision-making negotiators do every day." (Sharpe 2020: 174) This is the art of negotiation, the art of having practical wisdom, *phronesis*: knowing when, why, with whom, and what to negotiate, based on the constraints and possibilities of a specific context.

Carrie combined scientific rigour with an artistic sensibility. And she went beyond Raiffa in an important respect regarding the science and art approach to negotiation. She offered a way of understanding how "systematic analysis"—to use Raiffa's term—theoretical frameworks, and experimental inquiry (or the science) are connected to the behavioural and situational dimensions of negotiation (or the art).

Carrie understood that negotiation theories are analytical systems for organizing and making sense of negotiation experiences. But they are also much more than that. She viewed negotiation also as a web of pragmatic beliefs. For her, "the frameworks we choose (distributive division or integrative creative problem solving) for negotiation affect the behaviors we enact, which in turn produce the outcomes we get" (Menkel-Meadow 2022: 9). In other words, negotiation theories, like pragmatic beliefs, shape how we act in the world and how we relate to others and ourselves. Like pragmatic beliefs, they are dispositions to act (and react) in particular ways within negotiation contexts. Negotiation science constitutes and intrinsically shapes how negotiators perform the "art of negotiating" .Yet the relationship is not one-directional. The practice of negotiation in specific contexts also informs, challenges, and refines negotiation theory. "Contexts vary so we cannot assume that particular conceptual models apply in all circumstances" (Menkel-Meadow 2022: 35). Thinking about negotiation is thus, to invoke Hannah Arendt's account of thinking more generally, an ongoing dialogue between understanding and experience (Arendt 1977: 6), concept and context, or art and science.

Raiffa sought "to broaden the horizons of people who think narrowly about negotiations" (Raiffa 1982: 357). Carrie's intellectual life has taken this path, too. His influence on Carrie can be seen on at least two levels. First, he helped draw attention to the importance of numbers in negotiation, that is, to the fact that the number of parties, interests, and decision criteria can significantly shape negotiation dynamics and therefore require different analytical frameworks and approaches. "Multi-party negotiations have their own separate logic from dyadic (two-party) negotiations", Carrie writes (Menkel-Meadow 2022: 39). Second, he provided a vocabulary and a conception of negotiation that operates at the intersection of scientific inquiry and practical artistry. Carrie, however, expanded Raiffa's understanding of the art of negotiation beyond interpersonal skills alone. For her, the art of negotiation encompassed behaviours, strategies, tactics, and the practical judgement required to discern when to act, what to say, and how to respond in particular negotiation contexts (Menkel-Meadow 2022: 35)—as if Follett's law of the situation filtered Raiffa's negotiation approach.

After interviewing Carrie and revisiting some of her work in light of Follett, Fuller, and Raiffa, I realized that the reflections of their ideas in Carrie's work create a pathway for future generations to begin contemplating what could be called "the philosophy of ADR". Carrie's work in this sense acts like a prism that projects and transforms the core principles and ideas she inherited from her intellectual precedents.

[D] TOWARD A JURISPRUDENCE OF ADR

A jurisprudence of ADR (negotiation or conflict resolution) is an invitation to re-examine ADR discourses and practices through the lens of philosophical ideas, theoretical innovations, and procedural methodologies that expand our pragmatic, imaginative, and cognitive horizons. It provides both an analytical framework for understanding what ADR, negotiation, mediation, and other forms of social ordering and dispute processing are and a vocabulary for imagining what they could become.

A caveat is in order: I do not pretend to establish or provide a comprehensive analysis of what a jurisprudence of ADR (negotiation or conflict resolution) should be concerned with. I will simply use Carrie's main takeaways to articulate potential lines of inquiry and questions that might foster generative discussion within the fields of ADR, legal philosophy, and related disciplines.

The jurisprudence of ADR is Protean.[6] First, the jurisprudence can be an *examination* of the practices, discourses, and assumptions of conflict prevention, resolution, or transformation. Second, it can also be *a way of looking at the meaning* of ADR (either through conceptual analysis or pragmatic consequences) in terms of its analytical elements, that is, the building blocks that constitute the grammar of dispute resolution. In this sense, it calls for a conceptual analysis of interests, needs, positions, alternatives, criteria, options, strategies, techniques, behaviours, conflict and its modalities, parties and stakeholders, neutrals, consent, and other notions that are part of the ADR grammar. Finally, it might be a *critical tool* to expand the horizons of what we regard as ADR and dispute resolution. For instance, Amy Cohen's work has suggested viewing ADR as a site for democratic micro-experiments, an attempt to "prefigure some reimaginations" of co-existence amidst tension (Cohen 2020: 176), and a means "of cultivating self and social relations differently" (Cohen 2022: 136). Andrew Mamo's work, instead, has proposed to look at ADR

[6] For the purpose of this article, I use interchangeably the notion of jurisprudence and philosophy of ADR.

as a site for addressing challenges and modulations to key socio-legal and political concepts, such as community, identity, and the tensions between universalism, embedded in interest-based negotiation theories, and particularism, enshrined in communitarian theories of dispute resolution (Mamo 2019: 1454-1455). These scholars, influenced by Carrie herself, expanded the ADR grammar and functionality to include questions beyond conflict resolution, prevention, and transformation, such as prefigurations of democratic practices, decentralized forms of egalitarian organizations, and reconstructed ideas of how to live in common, questions that Carrie's work has been concerned with (Menkel-Meadow 1995; 1996).

However, Carrie's philosophical and critical engagement with ADR has largely been in the space of reframing the debate over whether to be for or against settlement. Instead, Carrie adopts a Follettian and Fullerian take by asking a question that, to some extent, her intellectual fathers and mother have been perplexed by: *when*, *how*, and *under what circumstances* we should advocate for settlement in a particular dispute (Menkel-Meadow 1995: 2665). And the correlative value-laden question: when do we know which settlements are good? To paraphrase Carrie: *how do we know which settlements to be for and which to be against? And how do we know when they are good?* These questions introduce, as some scholars have done before, a relevant epistemological and moral philosophy inquiry into the philosophy of ADR (Luban 1985).

Exploring Carrie's intellectual fathers and mother reveals different pathways to the jurisprudence of ADR, particularly to address Carrie's question of *when*, *how*, and *under what circumstances* settlement is desirable. Carrie's engagement with Follett, Fuller, and Raiffa raises the following potential avenues for reflecting deeper about the paths Carrie's work, through her dialogue with her intellectual fathers and mother, has made available. Each jurisprudential approach is countered with a "counter-jurisprudence". Here is the list of potential jurisprudential trends in ADR:

- ◊ Fragmentary jurisprudence of ADR or a comprehensive jurisprudence of ADR.
- ◊ Static jurisprudence of ADR or dynamic jurisprudence of ADR.
- ◊ Process pluralism jurisprudence of ADR or multi-modal pluralism jurisprudence of ADR.
- ◊ Positivistic jurisprudence of ADR or a hermeneutical jurisprudence of ADR.
- ◊ Descriptive jurisprudence of ADR or critical jurisprudence of ADR.

ADR jurisprudence	Definition	ADR counter-jurisprudence	Definition
Hybridized jurisprudence	A framework concerned with the combination of forms of social ordering (or dispute resolution process) and creating new hyphenated forms of social ordering and dispute processing to expand ADR's repertoire.	*Taxonomic jurisprudence*	A framework concerned with identifying the principal forms of social ordering (or dispute resolution process) and exploring their moral integrity (essence).
Multi-level jurisprudence	A framework that theorizes, as distinct logical and analytical entities, dyadic, triadic, and other multi-party processes, as well as single- and multiple-issue disputes and single-criterion or multiple-criteria conflicts.	*Systematic jurisprudence*	A framework that seeks a comprehensive analytical and logical vocabulary to theorize indistinctly dyadic, triadic, and other multi-party processes, as well as single- and multiple-issue disputes and single-criterion or multiple-criteria conflicts.
Dynamic jurisprudence	A framework that theorizes ADR from the premise that positions, needs, interests, and human relations (and selves) are dynamic and can only be fixed for analytical purposes.	*Static jurisprudence*	A framework that theorizes ADR from the premise that positions, needs, interests, and human relations (and selves) are static and can be fixed and studied as static phenomena.
Multi-modal pluralism	A framework based on the premise that processes, even when mixed or hybrid, cannot by themselves adequately address human conflicts and that productive conflict engagement requires additional modalities, such as cultivating practices of self-transformation, designing spaces that contain conflict, and developing rituals or ethical practices that shape social relationships	*Process pluralism*	.A framework grounded in the premise that no single process can adequately address all disputes and that therefore seeks to develop forms of hybridity, variation, and mixed processes capable of enhancing human problem-solving (Menkel-Meadow 2006)
Positivistic jurisprudence	A framework that treats dispute resolution processes as identifiable and analysable systems whose effectiveness can be studied through formal rules, procedural design, and measurable outcomes. It is concerned with the difference between what ADR is from what it ought to be.	*Pragmatic-hermeneutical jurisprudence*	A framework concerned with interpreting how processes shape human interaction, social order, and possibilities for integration at different scales.

Figure 1: ADR jurisprudence and ADR counter-jurisprudence.

Follett, Fuller, Raiffa, and Menkel-Meadow laid the foundations for a jurisprudence of ADR concerned with ontological, procedural, teleological, moral, political, scientific, and artistic questions. This jurisprudence invites us to continue experimenting with methods of resolving differences while remaining attentive to the philosophical machinery we often rely on when we think about preventing, transforming, and resolving conflict. It also directs our attention to the practices through which subjectivities are forged, democratic experiments are enacted, and relationships with ourselves and others are deconstructed and reconstructed in the pursuit of alternative forms of coexistence.

[E] CODA: RE-SIGNIFYING THE PAST

Carrie concluded her groundbreaking article on the fathers and mothers of ADR, arguing that "[t]he field of dispute resolution now demonstrates great intellectual eclecticism (some would say breadth), coupled with an almost necessary American pragmatism in its practice and constantly expanding application to new fields of human endeavor" (Menkel-Meadow 2000: 35). This line is as valid now as it was then.

Genealogical work triggers new thinking about old themes (Menkel-Meadow 2000: 37). It pushes us to trace and examine the sediments of the past to better understand where we come from and where we are going. Genealogical work is not an artificial methodology for uncovering the past and stating the obvious: we are historical beings shaped by the social, political, and historical forces that precede us. Genealogical work makes a more subtle point: to examine ourselves, the field in which we labour, and the ideas that we believe might help us better navigate a world marked by conflict, we need to trace ideas across space and time, give voice to forgotten thinkers, and re-signify the past not to recover it, but to reinterpret it in light of our current predicament. In doing so, we can better understand what the practical bearings of the past are in the present and perhaps gain a glimpse into how we know what we know about ADR.

Talking to Carrie, reading her work, and engaging with her fathers and mother made me more aware of her theoretical positions, innovations in ADR, and the ways they have filtered my own thinking. Knowing where we (and our ideas) come from is perhaps one of the few tools we have for understanding what we know. Carrie's work and life are a testament to this.

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Thus I Became a Lawyer …: Socialization into Becoming and Being a Lawyer in Germany

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Abstract

This article examines how German legal education and training socialize students into the legal profession. It analyses the state-regulated two-stage system, its demanding examination culture, hidden curriculum and distinctive professional habitus. Particular attention is paid to students' social background, uncertainty and competition, the relationship between academic study and practice, transferable professional competencies, internationalization and the feminization of law. The article argues that German legal education fosters a strong professional identity and respect for law, but may also reinforce conformity, social homogeneity and conservative professional cultures.

Keywords: legal education and training; professional socialization; legal profession; Germany; state examinations; professional habitus; gender; sociology of law.

[A] DEDICATION

I first met Carrie Menkel-Meadow in 1988 at a meeting of the newly established Working Group on Legal Professions of the Research Committee on the Sociology of Law.[1] At that time, neither of us could have anticipated how influential her work would become for the field or how many professional paths our interests would continue to cross over the following decades.

Carrie contributed the seminal chapter, "Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers", to *Lawyers in Society: Comparative Theories Volume 3* (1989: 196–255) of the landmark

[1] The Research Committee on Sociology of Law (RCSL) is Research Committee 12 of the International Sociological Association (ISA) which was founded in 1949. The RCSL was founded in 1962.

international Lawyers in Society project.[2] As one of the first women in legal academia in our respective countries with a research interest in women in the legal profession, I found her work both inspiring and encouraging.[3] Her comparative perspective opened new ways of thinking about the profession and helped shape my own research.

Over the years, we have remained in regular contact and have shared many intellectual interests, not least in the fields of women in the legal profession and alternative dispute resolution. Reflecting on women lawyers inevitably raises broader questions about the legal profession itself and about the processes through which lawyers acquire their professional identity. It is therefore a particular pleasure to contribute to this Special Section honouring Carrie Menkel-Meadow, whose scholarship has enriched not only our understanding of the legal profession but also the wider fields of dispute resolution, legal ethics, and feminist legal scholarship. These questions have accompanied my own work for many years and provide the starting point for this article on the socialization of lawyers in Germany—a topic that may be of particular interest to Carrie, given her German roots.

Deeply embedded in the history and traditions of the legal profession, legal socialization in Germany has proved remarkably persistent. This article first traces the historical development of German legal education and the emergence of its distinctive model of professional socialization. It then examines the structures, rigidities and dysfunctions of contemporary legal education and the factors that continue to shape the professional orientations and modes of legal reasoning of German lawyers. Finally, it asks whether, and how, two major transformations—the feminization of the legal profession and the growing use of artificial intelligence (AI)—may challenge established patterns of legal socialization. While feminization has fundamentally changed the social composition of the profession, AI may affect the very processes through which legal knowledge, modes of reasoning and, ultimately, professional identity are acquired.

[2] Abel & Lewis (1988a; 1998b; 1989). I contributed, together with Erard Blankenburg, a chapter to *The Civil Law World, Volume 2* on "German Advocates: A Highly Regulated Profession" (Abel & Lewis 1998b: 124–159).

[3] In a subgroup to the Legal Profession Group on Women/Gender in the Legal Profession many publications were produced, amongst them the big comparative volumes by Schultz & Shaw, *Women in the World's Legal Professions* (2003) and *Gender and Judging* (2013); and Schultz & Ors, *Gender and Careers in the Legal Academy* (2021).

Thus I Became a Lawyer,

Bought myself a large inkwell,

Bought myself a leather briefcase

And a heavy Corpus Iuris,[4]

And sat diligently in the lecture hall.[5]

[B] GUIDEBOOKS FOR LAW STUDENTS—WHY DO THEY EXIST?

What does it mean to become a lawyer? A considerable number of guidebooks seek to answer this question by explaining what qualities prospective students should possess, who is suited to study law, and how legal studies can be pursued successfully.

One of the earliest examples is Hans Liermann's little book *And Thus I Became a Lawyer …*, first published in 1959. In a series of thirty-two letters addressed to the son of a friend, the Erlangen law professor discusses precisely these questions. He begins by asking: what makes you want to study law? And concludes with two letters describing the wide range of professional careers open to law graduates. The book provides a remarkably realistic account of legal education and the legal profession in Germany during the 1960s.

Another example is Peter Dyrchs' *Letters to Passionara*, published in four volumes between 2005 and 2006. Reflecting changing social attitudes, these fifty-seven letters are addressed to a young woman rather than to a young man. The name Passionara itself signals the author's conviction that enthusiasm and commitment are indispensable qualities for studying law. Accordingly, the fourth letter is entitled "Against the Silent Fears of the Beginning Student: Passionara Draws Strength from Her Motivation!". The eleventh letter initially startles the reader with the statement that learning driven by secondary virtues will become Passionara's principal occupation as a law student, before turning, in the following letters, to the legal method of analysing cases.

A further collection, *Letters to Young Lawyers*, edited by Tobias Gostomzyk and Joachim Jahn in 2015, follows the same literary

[4] Referring to the *Corpus Juris Civilis* (Body of Civil Law), compiled under the Byzantine Emperor Justinian I between 529 and 534 CE which became the foundation of the civil law tradition in continental Europe. In Germany it was still in use in the 19th century as the "*gemeines Recht*" (common law of Germany). It is used as a phrase for the archetypal volume of legal learning.

[5] From the poem by Joseph Victor von Scheffel, "Der Trompeter von Säckingen" (1853).

tradition. In thirty-two letters, lawyers from a wide variety of professional backgrounds reflect on their own educational pathways and careers. The somewhat old-fashioned epistolary format illustrates how deeply legal scholarship remains rooted in centuries-old traditions in which the senior members of the profession pass on their experience and values to the next generation.

Beyond these works there is an almost bewildering number of study guides for aspiring lawyers,[6] with titles such as *Secret Strategies for Successful Legal Studies*. Comparable literature is rarely found in other academic disciplines. Apparently, legal education continues to be surrounded by a degree of mystery and mythology that is largely absent elsewhere.

Why is the study of law regarded as so distinctive that prospective lawyers require special guidance about both their education and their future profession?

[C] THE STRUCTURE OF LEGAL EDUCATION

Legal education in Germany consists of two successive stages. Four to six years of university study at one of the country's forty-three law faculties are followed by a two-year period of practical training (*Referendariat*), during which trainee lawyers (*Referendare*) are employed by the judiciary. Until a few decades ago they formally held the status of probationary civil servants. During this practical stage they rotate through placements at courts, public prosecutors' offices, law firms and public administrative authorities.

Unlike in many other countries, university law faculties do not determine the curriculum. Instead, legal education and examination are regulated by federal and state legislation, in particular the state laws and regulations on legal education and section 5a of the German Judiciary Act (*Deutsches Richtergesetz*). State judicial examination authorities conduct the state examinations, while the Higher Regional Courts (*Oberlandesgerichte*) administer the practical training period. The state—and especially the Ministries of Justice—therefore exercise considerable control over legal education while at the same time conferring upon it its official seal of quality.

[6] Numerous additional sources of advice are available online, including online forums and social media groups in which law students exchange study tips and discuss problems encountered during their legal education. The websites of law faculties and student law societies (*Fachschaften*) likewise provide useful information.

The two examinations—the First Examination at the end of university studies[7] and the Second State Examination after completion of the *Referendariat*—qualify graduates for judicial office (*Befähigung zum Richteramt*). This qualification is also the statutory prerequisite for appointment as a public prosecutor, admission to the legal profession as a lawyer, and appointment as a notary. Consequently, everyone entering one of the classical legal professions undergoes the same highly standardized, state-regulated education leading to qualification as a fully qualified lawyer (*Volljurist*). This model of the *Einheitsjurist*—the fully qualified lawyer eligible for all major legal professions—is unique to Germany.

The strong role of the state in legal education has deep historical roots. During the 18th century, the Prussian kings effectively nationalized the legal profession, primarily in order to ensure quality control. Representation before the courts was carried out by salaried public officials, while other state officials combined legal advisory and notarial functions (Blankenburg & Schultz 1988: 126). When the German Empire was established under Prussian leadership in 1871, this close relationship between the legal profession and the state became firmly embedded both in legal education and in the organization of the legal profession under the Lawyers' Act of 1878 (Bleek 1972; Schultz 2003a). The traditional proximity of lawyers to the state also explains why practical training has always included a placement in public administration (Kilian & Schultz 2020).

[D] WHAT DO LAWYERS LEARN? LEGAL EDUCATION AND TRAINING

German legal education is traditionally organized around three major branches of law: private law, criminal law and public law. Students are required to pass examinations in each of these core subjects, supplemented by courses in the foundations of law.

The principal aim of legal education is to teach students the substance of positive law—that is, enacted law—and its application to individual

[7] As part of a reform of German legal education in 2003, the traditional First State Examination was replaced by the ""First Examination"", consisting of a state compulsory examination (70% of the final mark) and a university specialization examination (*Schwerpunktbereichsprüfung*), which accounts for the remaining 30%. The reform was intended to strengthen the academic profile of law faculties and to encourage greater specialization and scholarly depth in legal education. Reform of legal education has always been a recurring topic of debate. The discussion is currently being advanced by the Society for Legal Didactics (*Gesellschaft für Rechtsdidaktik*), established in 2024, and will also constitute the principal theme of the 2026 German Jurists' Conference (*Deutscher Juristentag*).

cases. Throughout their studies they learn the highly formalized style of legal reasoning[8] and legal opinion-writing (*Gutachtenstil*). During the *Referendariat* they additionally learn the skills required to draft judicial decisions,[9] prosecution files and other legal documents. In essence, the system continues to prepare students primarily for judicial careers, although for many decades now the majority of graduates have ultimately entered private legal practice (Schultz 2011).

Law is a discipline with a remarkably long intellectual tradition and a correspondingly distinctive professional culture (Liebau & Huber 1985). German law combines elements inherited from Roman law—symbolized by the *Corpus Iuris*—with those of Germanic legal traditions.

Although legal education is intended to prepare students for legal practice, the teaching of law remains firmly embedded within the university and is largely taught by academic professors. Systematic exposure to the practical work of lawyers occurs mainly during the subsequent *Referendariat*.

The opening verse quoted above captures students' experience remarkably well. Law students spend much of their time writing ("a large inkwell"), carrying heavy books ("the *Corpus Iuris*") and, above all, sitting for long hours in lecture theatres, listening, reading and learning.

The character of legal education has nevertheless changed considerably in the past decades. In the 1950s and 1960s, legal studies were even less structured than they are today. There was less legislation, less extensive and differentiated case law and far less specialist literature to master. Students received little systematic guidance and were largely expected to organize their studies themselves—to a considerable extent, this however remains true today. The underlying ideal was that of the broadly educated *Generalist*, equipped with a general legal education rather than specialized knowledge.

From the late 1960s onwards the traditional model came under sustained criticism (Loccumer Arbeitskreis für Fragen der Juristenausbildung 1970). Against the background of a broader critique of the state and its institutions, reformers regarded legal education

[8] Known as *Subsumtion*: the facts of a case are reduced to their legally relevant elements and then fitted within the applicable legal rules. Mastering this process demands a sound understanding of legal methodology and legal argumentation, even if the exercise itself is often highly technical.

[9] Called *Relationstechnik*. It is a distinctive German method of legal analysis used primarily in civil procedure during practical legal training. It provides a systematic framework for identifying, organizing and evaluating the factual and legal issues arising in complex civil disputes before drafting a judicial decision.

as overly doctrinal and detached from social reality. They demanded greater attention to the social, economic and political contexts of law and greater familiarity with neighbouring disciplines (Wassermann 1969; Loccumer Arbeitskreis für Juristenausbildung 1970: 12-24; Lührig 1997: 116-124).

An important attempt at reform took place during the 1970s with the introduction of experimental one-stage models of legal education, integrating academic study and practical training in alternating blocks. Teaching was conducted in small groups, in contrast to the conventional mass instruction in large lecture halls. These reforms strengthened the teaching of jurisprudence, legal sociology and other foundational subjects. Their explicit objective was to educate lawyers capable of critical reflection—a deliberate response to the experience of the "terrible lawyers" (*furchtbare Juristen*) of the Nazi era, who had administered injustice through technically correct applications of Nazi law (Müller 1987). After approximately two decades, however, these reform faculties had to abandon the experimental model. Traditional structures and practices proved too deeply entrenched and financial considerations also played a role. Eventually, all law faculties returned to the established two-stage model. Although foundational subjects have retained a formal place, they have remained marginal to the core of legal education, which is shaped by the demands of the state examination and the mastery of a growing body of legal doctrine (Wissenschaftsrat 2012; Sörgel 2014).

Reform of legal education has been a recurring topic of debate in Germany. The discussion has recently gained renewed momentum with the establishment of the Society for Legal Didactics (*Gesellschaft für Rechtsdidaktik*) in 2024 and has also been chosen as the principal theme of the 2026 German Jurists' Conference (*Deutscher Juristentag*). Current reform efforts focus particularly on reducing the considerable volume of material to be covered and shifting the emphasis from the accumulation of doctrinal knowledge towards methodological and problem-solving skills. At the same time, greater attention is being paid to teaching methods and the didactic qualification of law teachers.[10]

What matters from the perspective of professional socialization, however, is not only the knowledge and skills transmitted through this system, but the particular way of thinking that students acquire in the process.

[10] An important milestone was the publication of the *Handbook of Legal Education and Didactics* (Krüper 2022), which offers a broad, though by no means exhaustive, engagement with questions of legal didactics (Schultz 2023).

[E] WHO BECOMES A LAWYER? SOCIAL BACKGROUND AND MOTIVATION FOR STUDYING LAW

Most German law students come from middle-class families. The representative study "Justice as a Profession" (*Gerechtigkeit als Beruf*), conducted in the late 1970s by Andreas Heldrich and Gerhard Schmidtchen, found that children of civil servants were particularly overrepresented among law students. They are joined by students from higher middle-class and upper-class families who choose to study law as part of a long-standing family tradition (Heldrich & Schmidtchen 1982: 252). More recent studies have confirmed these findings (Böning 2017b).

Among the traditional professions, such as law and medicine, the influence of parental occupation on students' choice of subject is stronger than in almost any other field of study (Hartmann 2002). This reflects both the desire to maintain social status and prestige and the fact that growing up in an academic or legal family provides the intellectual environment and cultural capital that make studying law appear both attractive and attainable (Schölling 2005; RuhrUniversität Bochum 2012: 18; Böning 2017b).

Law is frequently chosen as a "default" degree by students who have not yet developed a clear vocational ambition. More positively expressed, however, many are attracted by the exceptional breadth of career opportunities and the favourable employment prospects that a law degree offers (Schultz & Ors 2018: 297).

Empirical studies consistently show that law students display particularly high levels of academic motivation—well above the average across German universities (Böning & Schultz 2018: 197). Like medical education, legal education is characterized by demanding academic standards and high expectations of student performance. Most students aspire to achieve an excellent degree (Multrus & Ors 2017; Schröder 2022).

[F] THE SYSTEM OF PROFESSIONAL SOCIALIZATION

Problematic features of legal studies at university

At the same time, students report a number of significant problems (Schultz & Ors 2018: 203). The most frequently mentioned are limited contact with academic staff and strong competition among fellow students. Roughly one-third feel overwhelmed by the volume of knowledge they are expected to master, and law students are among those most likely to doubt their own academic ability: approximately 42% report uncertainty about whether they are capable of completing their studies successfully (Multrus & Ors 2017; Schröder 2022).

The breadth of the subject matter constitutes a considerable burden in itself. Together with students of business and economics, law students report higher levels of anxiety than students in almost any other discipline with regard to examinations, navigating their course of study, and coping with the extensive formal requirements governing their studies (Multrus & Ors 2010).

Overall, law students perceive the social climate within their faculties as relatively poor. Many describe an environment characterized more by rivalry than cooperation, which not only makes studying more difficult but may actively impede academic success. More than half of all students identify competition among their peers as a significant problem (Multrus & Ors 2017).

At the same time, legal education pays comparatively little attention to developing social responsibility. Instead, material aspects of future employment—particularly a high income and opportunities for career advancement—are regarded as important incentives for choosing the profession (Multrus & Ors 2017).

Equally revealing is the way students organize their studies. According to the findings of the regularly conducted student surveys,[11] almost half of law students attended fewer classes than prescribed by the curriculum. This reflects the well-known discrepancy between what universities teach and what students perceive to be relevant for passing the state examinations. Legal education also receives lower evaluations for teaching quality than many other disciplines.

[11] See Bundesministerium fürForschung, Technologie und Raumfahrt, "Studierenden-Forschung"; compare also Multrus & Ors (2010: 7).

Teaching methods remain largely traditional. Knowledge is primarily transmitted through one-way teaching, in which professors systematically explain statutory law while students—still tellingly referred to in German as "listeners" (*Hörer*)—are expected to absorb the material. Students typically encounter their professors in large lectures often attended by several hundred students, with relatively little opportunity for direct interaction. Legal education at German universities is characterized by a particularly unfavourable student-to-professor ratio.[12]

Uncertainty in the absence of a coherent curriculum

One striking feature of German legal education is that the requirements of the programme are never fully transparent. Unlike many other university subjects, legal education is not organized around competence-based curricula or clearly defined learning outcomes. The regulations in the Acts of the federal states governing legal education merely specify the subjects that students are expected to master for the state examinations.

The result is considerable uncertainty about what students actually need to learn and how they should organize their studies. This lack of orientation is one of the factors contributing to the remarkably high dropout rate. More than half of those who begin studying law never reach the First State Examination, and a further 10% do not proceed to the *Referendariat*.

Discipline through grades: the culture of assessment

The pleasure of studying law is further diminished by an exceptionally rigorous grading culture.

The German grading system in legal education differs markedly from conventional university marking schemes. It includes the distinctive grade *vollbefriedigend* ("fully satisfactory"), commonly referred to simply as the *Staatsnote* ("state grade"). Achieving this mark is widely regarded as the passport to an outstanding legal career, opening the doors both to the judiciary and to leading commercial law firms.

Only around 2% of candidates obtain the grades "good" or "very good" in either State Examination, while approximately 15% in the First Examination—and slightly more in the Second—achieve the coveted grade *vollbefriedigend*. For many years the failure rate in the First

[12] In 2024/2025, there were approximately 89 law students for every C3/W2 or C4/W3 professorship. This is roughly twice as many as in all the other subjects combined (unpublished higher education statistics provided by the Federal Statistical Office –*Statistisches Bundesamt* -).

State Examination has remained at around 30%; in the Second State Examination it is approximately 14% (Roloff & Schultz 2016: 21ff).[13]

During the *Referendariat*, trainees are assessed repeatedly by supervising judges, prosecutors, administrative lawyers and practising attorneys in each placement as well as in accompanying training groups. Although marks awarded at this stage tend to be somewhat higher, most trainees receive no more than an assessment equivalent to "satisfactory" in the final examination.

Grades therefore acquire enormous biographical significance. They shape professional identity and self-perception long after legal education has ended. Those who successfully survive what many describe as the "purgatory" of the State Examinations may develop the stereotypical legal self-confidence—sometimes perceived by outsiders as legal arrogance—that accompanies admission to one of Germany's most prestigious branches of the legal profession.

At the same time, examination results function as an official state quality label that continues to exert a powerful influence on career opportunities throughout lawyers' professional lives.

Bridging—or reinforcing—the gap between theory and practice

A longstanding question in German legal education is whether universities should primarily teach legal scholarship or prepare students for legal practice.

Unlike in many common-law countries, legal education is almost exclusively provided by university academics. Most professors have spent virtually their entire careers in research and teaching and possess comparatively limited practical experience of legal work. Academic appointments continue to require both a doctorate and a "habilitation",[14] and newly appointed professors are on average around thirty-nine years old (Schultz & Ors 2018: 168).

The curriculum concentrates on solving complex legal problems presented in carefully constructed hypothetical cases. Students are therefore trained above all as technicians of the law. At the same time, however, legal education also encourages critical reflection on legal

[13] The latest examination statistics can be found here: Ausbildungsstatistik.

[14] The habilitation is the second "big book", and the subject of the doctoral thesis and the habilitation have to be different to guarantee that the candidate's qualification is broadly based.

reasoning itself. Particularly in constitutional and public law, students learn to examine legislation against constitutional principles. They are thus introduced to the constitutional value system and gradually come to regard themselves as guardians of the rule of law.

Influenced by developments in Anglo-American legal education, practical training has nevertheless become more prominent in recent years. Since the liberalization of German legislation governing legal advice, universities have established student law clinics in which legal advice is provided under the supervision of practising lawyers. Moot court competitions have likewise become widespread, enabling students to develop advocacy skills in simulated court proceedings (Kilian & Schultz 2020: 227).

In addition, all law students are required to complete three months of practical placements during their university studies, spending time in courts, public administration or legal practice before entering the *Referendariat*.

The trauma of the state examinations

One peculiarity of German legal education is that those who teach students are generally not the ones who examine them. The state judicial examination authorities administer the state components of the First Examination and the Second State Examination. Written examination papers are marked predominantly by legal practitioners, including judges, prosecutors, government lawyers and practising attorneys (Schultz & Ors 2018: 216).

As a rule, candidates have never met their examiners before. The absence of any personal relationship constitutes an additional source of uncertainty. It also raises the question of how well university teaching actually prepares students for the examinations.

For both stages of legal education, many students therefore turn to private coaches (*Repetitoren*), an institution with a long history in Germany (Ranieri 1985: 7). These commercial providers, sometimes referred to colloquially as “crammers”, prepare students specifically for the State Examinations. In contrast to the anonymity of large university lectures, some offer intensive individual supervision and personal mentoring. Private exam preparation for law students is a lucrative business in Germany.

Since the scope of the examination syllabus is virtually unlimited and the examination requirements are never precisely defined, the State

Examinations are widely perceived as a "black box". Students frequently feel that success depends not only on ability but also on the unpredictable expectations of individual examiners.

In this respect the examinations resemble classic initiation rituals or rites of passage (Kvale 1972; Prahl 1976; Schultz & Ors 2018: 205). Even decades later, lawyers vividly remember particular examination problems in the case scenarios they were required to solve in the written part[15] of their examinations and situations from their oral examinations. They recount these experiences to younger colleagues much as military veterans exchange memories of decisive battles.

Ultimately, the examinations function as a test of conformity (Schütte 1982; Portele & Schütte 1983: 32). At the same time, the relatively homogeneous social background of law students already contributes to a considerable degree of conformity long before the examinations themselves begin (Kulamadayil 2024).

Does the place of study matter?

Compared with most other academic disciplines—and unlike legal education in many other countries—the particular university at which a student studies law has relatively little influence on later career success. Since the State Examinations are externally administered by the justice authorities, what often matters more is the federal state (*Land*) in which legal education has been completed.

In recent years various rankings of German law faculties have become popular. The long-established faculties generally perform better than those founded during the university expansion of the 1960s and 1970s. Yet students' satisfaction with their studies appears to depend much less on the indicators used in these rankings—such as publications, research reputation or external funding—than on the quality of teaching, personal contact with academic staff and the overall learning environment (Schultz & Ors 2018: 242).

Nevertheless, law faculties differ considerably in their institutional cultures. Some are regarded as more conservative, others as more

[15] This applied even more strongly to the four- to six-week written examination assignments which, in almost all German states, used to form part of both state examinations. In the First State Examination, candidates were required to prepare a legal opinion on an assigned case; in the Second, they had to analyse a case file and draft a legal opinion and judgment. These extended examination assignments were eventually abolished in most states in 2003, as the internet facilitated copying and pasting, the nationwide sharing of solutions, and plagiarism, making it increasingly difficult to ensure that the work submitted was the candidate's own.

progressive. Although the general rule against appointments to professorships at the university where they completed their habilitation (*Hausberufungsverbot*) regularly brings new scholars into a faculty, informal mechanisms of co-option often serve to preserve existing academic cultures.

There are also marked differences between large and small faculties, between institutions drawing students primarily from their surrounding region and those attracting students from across Germany. A comparison of universities such as Tübingen (a traditional, relatively small faculty), Bochum (a "new" faculty, founded in 1966), Munich (a traditional, very large faculty), Bremen (a "new", reform-oriented faculty with a politically progressive profile), and Berlin illustrates the diversity of academic environments within German legal education.

More recently, additional differences have emerged as universities have been allowed to select their own students following reforms of the former central admissions system. Faculties admitting only applicants with outstanding school-leaving grades naturally tend to produce a disproportionately high number of graduates achieving the coveted distinction marks in the State Examinations.

[G] WHO—OR WHAT—IS A LAWYER?

Processes of assimilation: identity and *esprit de corps*

Legal education is far more than the acquisition of legal knowledge. Through observation, imitation and participation, students gradually become accustomed to the conventions, values and behavioural patterns of the legal profession. They slowly assimilate into what might almost be described as the legal "guild", acquiring the professional habitus characteristic of German lawyers. (Huber & Ors 1983; Schaeper 1997: 221; Schultz 2011; Böning 2017a; 2017b; Schultz 2025b).

Educational researchers have described this process as the operation of a "hidden curriculum" (Schütte 1982; Huber & Ors 1983). Much of what students learn is tacit knowledge: forms of understanding that are never explicitly taught but are transmitted informally through everyday academic practices, institutional routines and professional culture. In much the same way, teaching styles and academic habits are passed on from one generation of legal scholars to the next.

The uncertainty and, at times, alienation experienced during legal education (Portele & Schütte 1983; Schultz 1990: 331ff), together with

the considerable pressures shared by successive generations of students, create particularly strong bonds among future lawyers. Combined with the unusually long two-stage course of professional training, these experiences foster a pronounced *esprit de corps* and a durable professional identity that often remains with lawyers throughout their lives.

Competencies

Legal education is not merely about acquiring knowledge of statutes, case law and techniques of legal reasoning. After approximately five years of university study and two years of practical training during the *Referendariat*, graduates have developed a broad range of competencies that extend well beyond those formally specified in the legal education regulations. These competencies equip them for a remarkably wide variety of professional careers.

When young lawyers participating in continuing professional development courses are asked which competencies they acquired during their legal education—apart from legal knowledge itself[16]—they regularly identify the following strengths:

- ◊ structured, logical thinking and writing;
- ◊ precision, organizational ability and careful attention to detail;
- ◊ the ability to abstract from complex facts and identify the essential issues;
- ◊ objectivity and analytical reasoning;
- ◊ awareness of problems and the ability to question established assumptions;
- ◊ critical and self-critical reflection;
- ◊ the ability to work as a generalist and to familiarize oneself quickly with new subject areas;
- ◊ versatility, flexibility and the capacity to view issues from different perspectives;
- ◊ determination, powers of persuasion and confident decision-making;
- ◊ self-discipline, perseverance and a high level of intrinsic motivation;
- ◊ the ability to work effectively under pressure, meet deadlines and deliver results on time;
- ◊ eloquence, communication skills and the ability to construct convincing arguments;

[16] I have been asking this question for many years at professional development courses and seminars on legal career paths.

- ◊ commitment and a willingness to engage in intellectual and professional challenges; and
- ◊ independence (Schultz 2022b; 2022d).

Many of these competencies are transferable and explain why law graduates occupy leading positions not only within the legal professions but also in politics, business, public administration and many other sectors.

Interestingly, despite the considerable differences in legal education, the strengths identified by the young lawyers correspond closely to what the United States American Carnegie study (Sullivan & Ors 2007) describes as the cognitive apprenticeship of becoming a lawyer: legal education is remarkably successful in teaching students to "think like a lawyer": to analyse complex material, identify and structure problems, distinguish relevant from irrelevant information, and develop arguments and counter-arguments. The study, however, also identifies an imbalance between this strong cognitive training and the less systematic development of practical skills, professional identity and ethical responsibility, although this imbalance may need to be assessed differently in Germany because of the practical training provided during the *Referendariat*.

Internationalization

Although German legal education focuses primarily on German and European law, today's law students are increasingly internationally oriented. Periods of study abroad have become both common and highly valued. In earlier decades, Lausanne and Geneva were among the preferred destinations for German law students. Today, the European Union Erasmus programme[17] enables students to spend part of their studies at universities throughout Europe with financial support. In addition, many law faculties maintain exchange agreements with partner institutions around the world, offer bilingual degree programmes[18] and participate in international academic networks.[19]

Specialized legal language courses, available at many universities,[20] further prepare students for studying and working abroad while strengthening their intercultural and professional competencies.

[17] See European Commission, "Studium im Ausland".

[18] See Universität Münster, "Doppelabschluss".

[19] Eg Humboldt Universität Berlin, "Ins Ausland – Studierende"; Universität Heidelberg, "Partneruniversitäten".

[20] The law faculty in Münster was one of the first to offer such a certificate programme.

The *Referendariat* also provides opportunities for international experience. Administrative placements and, in particular, the elective stage may be completed abroad—for example in international law firms, German Chambers of Commerce Abroad, embassies or international organizations. Such experience has become especially valuable for careers in internationally operating law firms and other globally oriented legal workplaces.

Feminization

Until the 1970s, law was overwhelmingly a male domain. When I started to study law in Munich in 1966 we were 10% women, in fact the overall share of women amongst law students was around 10%. Only with the expansion of higher education and the availability of reliable methods of birth control did women's participation begin to increase substantially. Since the turn of the millennium, women have outnumbered men among law students in Germany and now account for almost 60% of the student body. Yet female students report an even greater sense of estrangement from the culture and practices of legal education than their male peers (Schultz 1990; 2003b). Despite making up the majority of law students, women continue to fare worse than men in the First State Examination: they are more likely to fail and, on average, achieve lower grades (Schultz 2003b: 276; Schultz & Ors 2018; Towfigh & Ors 2018).[21]

Unlike previous generations, women no longer leave legal education in disproportionately high numbers. As a consequence, they now account for more than half of the judiciary (Schultz & Ors 2011; Schultz 2012) and prosecution,[22] meanwhile close to 40% of practising lawyers are women, although women are much more likely than men to work as *Syndika/Syndikus*, that is, as in-house lawyers employed by companies or other organizations (Schultz 2018a).

The academic profession, however, has changed much more slowly. Women still occupy only a relatively small proportion of professorships in law,[23] and progress has been gradual (Schultz 2021). Legal education therefore continues to be taught largely within a male-dominated academic culture and female students still lack role models (Schultz 2014; Schultz & Ors 2018: 239).

[21] Again confirmed by the judicial education statistics 2024: "Ausbildungsstatistik".

[22] In Germany the prosecution is counted into the "*Justiz*".

[23] Women currently hold only 20% of the chairs (unpublished higher education statistics provided by the Federal Statistical Office - *Statistisches Bundesamt* -). Their representation varies considerably between law faculties. In 1980 it was 1.4%, in 2000 7.6% (Schultz & Ors 2018: 166; 2021).

Embedded in centuries-old traditions, legal education continues to transmit a rather conservative image of society, which students tend to internalize during the processes of professional socialization described above. This conservative orientation is particularly evident in the image of women presented in many legal textbooks and teaching materials (Schultz 2003b; Schultz & Ors 2018: 226; Schultz 2019). It may also be understood within the broader context of sexist practices that have repeatedly been documented in German legal education (Chebout & Ors 2016: 190).[24]

There are, moreover, persistent shortcomings in the use of gender-inclusive language. "This is particularly striking in a discipline that is fundamentally based on language and texts" (Chebout & Ors 2016: 191; see also Grabrucker 1993). Gender and diversity perspectives still occupy only a marginal place in mainstream legal teaching (Schultz 2020; Grünberger & Ors 2021; Schultz 2022a),[25] and these perspectives receive virtually no attention in continuing professional development (Schultz 2025a). In the substantial 1342-page handbook on teaching law and didactics (Krüper 2022), gender is not mentioned at all (Schultz 2023).

The German Women Lawyers Association (*Deutscher Juristinnenbund*, (djb)), which has more than 6500 members despite its relatively high membership fees, is an influential advocacy organization promoting legal and social policy reforms aimed at advancing gender equality. It also contributes to debates on improving legal education through policy statements and supports young women lawyers through mentoring programmes.[26]

AI and the changing professional role[27]

AI is likely to become another important factor in reshaping what it means to be a lawyer. Legal work has traditionally been associated with the command of specialized knowledge, the ability to locate and interpret legal sources, and the drafting of legal arguments and documents. Generative AI can already assist with, and in some areas partly perform, many of these tasks. This raises the question of which competencies will continue

[24] Sexist practices in German academia are also described in Schultz (2022c), an article which took as its starting point the American film *Picture a Scientist*.

[25] See also Schultz (2016a; 2016b). In 2008 I wrote a Gender Curriculum for law, updated in 2012 and 2018 (Schultz 2018b). It has never been discussed, either formally or informally, nor has it been implemented.

[26] See Lieber gleichberechtigt als später!.

[27] This section was developed in dialogue with ChatGPT (OpenAI).

to distinguish lawyers from increasingly sophisticated technological tools. The professional role may shift towards activities that require contextual understanding, critical evaluation, strategic judgement, communication and the assumption of responsibility for legal decisions and advice. At the same time, lawyers will increasingly need to assess the reliability of AI-generated information, recognize errors and biases, and understand the ethical and professional implications of its use. AI may therefore change not only the organization of legal work but also the professional self-understanding of lawyers and the qualities by which legal expertise is defined.

[H] CONCLUSION: CONSEQUENCES FOR LEGAL PRACTICE

Law is one of the largest and most influential academic disciplines within the German university system. Among women it is the second most popular field of study; among men it ranks fifth. Legal scholarship is closely associated with power and authority and tends to stabilize existing social arrangements (Hartmann 2002).

Through its institutional interconnections with legal practice and its responsibility to reflect upon and safeguard key guiding principles of modern society—such as justice, solidarity, human dignity, and individual freedom—legal scholarship occupies a distinctive position in society (Wissenschaftsrat 2012: 25).

Until the 1990s, German legislation required many leading positions within the state administration to be filled by fully qualified lawyers. Although this statutory "lawyers' monopoly" (Dahrendorf 1962; 1965) has gradually been relaxed, law may still be regarded as one of Germany's leading academic disciplines. Lawyers continue to occupy many of the country's most influential positions, and a substantial proportion of Members of Parliament have a legal qualification.[28] The close relationship between legal education and the state, together with the disciplinary mechanisms inherent in the educational system, nevertheless carries the risk of fostering excessive conformity and deference to authority.

Although the legal profession has become increasingly market-oriented during the past three decades, following a series of legislative reforms, professional autonomy remains more limited than in the classic Anglo-American model of the legal profession (Schultz 2003a; 2005; Kilian & Schultz 2020). German lawyers therefore cannot be regarded as an ideal-

[28] 124 of the 630 Members of Parliament (19.7%) hold a legal qualification.

type profession in the sociological sense developed in the Anglo-American literature.

The strongly competitive culture of legal education is also reflected in professional life, where deficits in collegiality have repeatedly been observed (Wagner 2014: 14ff). Lawyers constitute a comparatively homogeneous professional group characterized by a pronounced *esprit de corps*. They are generally internationally minded, yet at the same time many are socially and institutionally conservative.

Legal education inevitably inculcates respect for the law (*Rechtstreue*). At the same time, lawyers bear a particular responsibility *de lege ferenda*: they are expected to contribute to adapting the law to changing social conditions.

For precisely this reason, the socialization processes through which lawyers are formed deserve continuing critical attention. Lawyers are not merely legal technicians. They are guardians of the rule of law and custodians of the constitutional values upon which democratic society is founded.[29]

What is striking is the remarkable persistence of the structures and mechanisms of professional socialization in German law. It remains to be seen to what extent the growing use of AI will transform legal education and professional practice and, in doing so, reshape the mechanisms through which lawyers acquire their professional identity, values and ways of thinking.

About the author

Ulrike Schultz i*s a lawyer and retired Senior Academic at FernUniversität Hagen, Germany. She specializes in sociology of law and the legal professions, legal education, didactics and professional communication, and questions of gender and law. She is the organizer of many international comparative socio-legal projects and co-founder of the RCSL Working Group on the Comparative Studies of the Legal Profession, heading the subgroup on Women/Gender in the Legal Profession. From 2018-2023, she was President of RCSL—the International Sociological Association's Research Committee on Sociology of Law.*

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[29] For this reason, sociology of law should play a more prominent role in legal education.

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Carrie Menkel-Meadow and Me

Ana M Silva
Catholic University of Temuco, Temuco, Chile



Carrie and her student and friend Ana Silva.

I first met Carrie Menkel-Meadow in 2003 at Georgetown's Foundations of American Law programme. I was a Fulbright student from Chile.

Now, I am Law Professor. I was born and raised in the south of the country and I studied at the Catholic University of Chile (in Santiago) before moving back home to start working as a teacher at the Law School of the Catholic University of Temuco, a pioneering place because, since its creation 30 years ago, it has required all its students to take an alternative dispute resolution (ADR) course. It was to be a few years after taking up my post at Temuco that I would fulfil my dream of pursuing an LLM in the United States (US).

During that first week in Georgetown we experienced many classes and encountered many teachers. But it was Carrie who made such a huge impression on me that I decided I should take a class with her … even

though she was talking about US procedural law! There was something in her teaching style that was really engaging. And then I found out that her real areas of expertise (she has many) are negotiation and mediation—the focus of my LLM programme! So, needless to say, I decided to sign up for her course. I remember being terrified that it would be oversubscribed but I was lucky enough to get in and from then on it was a privilege to listen to her lectures and hear her reflections in the class. Furthermore, she always made time to meet with her students in her office—no matter how busy she was (and she is constantly busy with her numerous work projects).

The course Carrie was teaching that semester was her Negotiation and Mediation Seminar. Having taken the Harvard Negotiation intensive week-long seminar in 2002, I was impressed by her nuanced approach to negotiation but, most of all, by her wisdom and her generosity. I remember thinking how great it would be if a short version of her vision for negotiation were to be made available for the wider public. At the time, Carrie was working on her casebooks, which had not yet been published, so we set up a heavy folder containing the photocopied materials that would later become her *Dispute Resolution: Beyond the Adversarial Model* casebook (2018).

Then, in the second semester, I took her general ADR course and asked her to supervise my LLM paper, which she very generously did. My topic centred upon a group of indigenous Chilean women who were opposed to the construction of a hydroelectric dam on their ancestral property. She took an interest in the subject matter and supported me as I worked towards completion of my assignment.

I can honestly say that, for me, she was the single most important professor on my LLM Programme. She made my stay in Georgetown truly worthwhile and, most of all, memorable. I think I represent many international students in this regard.

Over the years, and notwithstanding the distance between the US and Chile, she never forgot about me. Furthermore, she has honoured me with her continuing mentorship and even her friendship, as she has done with many students over her long teaching career. I still remember my surprise in 2005 when I received on my doorstep a heavy package – it was a signed copy of the first edition of *Dispute Resolution: Beyond the Adversarial Model*! It was a very generous gesture—and the book became an invaluable teaching aid.

Carrie has always had a very close connection with South America, especially Argentina and later on also with Chile. A few years after my



Carrie, Ana and Bob in Buenos Aires in 2009.

LLM, through an invitation from another Chilean student (Carlos Silva, a colleague who was Carrie's student in 2004-2005, but not related to me), she spent a few weeks in Alberto Hurtado University in Santiago, as a Fulbright Senior Specialist. From Santiago, Carrie and her husband Bob drove the 700 kilometres to visit me and my family in my city of Temuco. We made time for some sightseeing in the "lake district" of Villarrica and Pucón, and also drove north to the Andes foothills to see the actual dam we had written about in my LLM Paper (the Ralco Dam). In my department at the Catholic University of Temuco, Carrie even taught a mediation seminar, which I translated for our Spanish-speaking audience. It was a great experience to be able to teach with her.

A couple of years later, she invited me to Buenos Aires to give a lecture at the Southwestern University Summer Programme, where she taught for many years. There she introduced me to her colleagues, distinguished professors who accepted me as one of their own.

Lately, she has honoured me by mentioning my name in the "Acknowledgments" in her book *Negotiation. A very Short Introduction* (2022). And she did it again in her *International Conflict Resolution Processes* (2025), marking another coincidence in our lives, as we both also teach International Law—a field closely related to peace and dialogue.

In February 2024 I visited her at UC Irvine, where she gave a lecture about International Conflict Resolution and invited me to attend her negotiation class, which brought back so many memories!

Having said all that, the most important thing for me is that my students at the Catholic University of Temuco, who will probably never pursue studies in the US, can benefit from Carrie's work because her casebooks, her *Negotiation: A Very Short Introduction* and her *International Conflict Resolution Processes* have all contributed enormously to my teaching. Furthermore, her influence in my life and on my teaching has been immense. She has been like an intellectual mother to me.

The only other thing that I would like to say is: "Carrie, I am so lucky to have met you … THANK YOU!"

Postscript

Another privilege that comes with Carrie's friendship is to meet and spend time with Bob, First-Gentleman extraordinaire … his intelligence, charm and witty sense of humour makes it a pleasure to talk to him every time we have had the joy of his company. He has also honoured me with his friendship.

About the author

Ana M Silva *is a Chilean Lawyer and Law Professor at the Catholic University of Temuco, Chile, and Santo Tomás University in Temuco. She studied Law at the Catholic University of Chile (graduated 1992). In 2003 she received a Fullbright Scholarship and subsequently was awarded an LLM from Georgetown University in 2004. She holds another Master's degree in State, Democratic Society and Law from the University of the Basque Country (UPV/EHU) (2024). See her* LindkedIn profile *for further details.*

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La Maestra: Carrie Menkel-Meadow, Master Teacher

Michalyn Steele
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On the first day of law school, the classrooms vibrate with nerves and insecurities. At Georgetown Law in fall semester 1998, my fears gave way to enthusiasm when Professor Carrie Menkel-Meadow began to speak in 1L Civil Procedure. We had found a master teacher who would not only unravel the knotty rules of Civil Procedure, but would lift our vision of the legal profession.

Before law school, I remember telling someone I did not want to be a lawyer because, "I didn't want to fight all day." I thought my natural inclination to broker compromise made me ill-suited to the craft. Then, I took every class I could from Carrie, including Alternative Dispute Resolution, Negotiations, and Consensus-Building for Multiparty Disputes. In her classes, I realized I loved law school and loved the idea of being a lawyer as she conceived of it. A lawyer, she taught, is a problem-solver. A lawyer finds a way to help resolve rather than stoke conflict. By re-theorizing the field, she helped make a place in the profession for value-added outcomes beyond the zero-sum of litigation. She taught that most of what lawyers actually do all day is to negotiate: with clients, with opposing counsel, with co-counsel, with partners, with friends. Skilled and principled negotiators and mediators helped to preserve ongoing relationships and empower clients. Her classroom was challenging and empowering, both demanding and fun.

As an attorney at the United States Department of Justice in the Civil Rights Division, I was junior counsel on a complex case of race discrimination under the Fair Housing Act. A federal magistrate judge was seeking to mediate a resolution to our case after several years of intense contentious litigation. As my senior counsel grew frustrated with the process and threatened to end mediation, I channelled my inner Menkel-Meadow! In my mind, I heard her principles and teachings urging me to focus on the interests of the parties and the risks of a litigated winner-takes-all result. I trace the negotiated resolution of that case,

without the relived trauma of trial testimony for the victims and with the assurance of significant compensation, directly to having been taught by Carrie Menkel-Meadow.

Now, I am a law school professor. It is daunting because I know what it looks like to do it at the highest level. I have watched Carrie be simultaneously a masterful teacher, a productive and consequential scholar, and a citizen of generational reach and impact. For so many in legal education, and certainly for me, Carrie is a kind of platonic ideal and role model. When I step into my classrooms, I aspire to take her sense of empathy and excellence with me. I aspire to instil the noble vision and values she taught in my own students. I hope to someday publish an article with the reach and influence that numerous of Carrie's books and articles have had, and will continue to have. Carrie has thought deeply about and shaped for the better legal pedagogy, the role of women in the profession, dispute resolution, access to justice, film and law, and many other topics of note.

Wherever she has gone, she has left those around her better than when she arrived, most especially her students. I count myself blessed to be one of them. To honour her many transformative contributions, taking legal education and the profession from monotone to symphony, I dedicate this humble haiku:

They knew but one note

But then the maestra re-scored.

Symphonies now play!

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Legislation, Regulations and Rules

Fair Housing Act 1985 (United States)

Special Section: Relations and Health—Interdisciplinary Reflections, edited by Marianna Iliadou, pages 347-476

Guest Editor's Introduction

Marianna Iliadou
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Welcome to this Special Section of Volume 8 of *Amicus Curiae*. As Guest Editor, I am delighted to introduce "Relations and Health—Interdisciplinary Reflections".*

The theme behind this Special Section is that relations are fundamental to health and healthcare. They shape how care is provided and received, how decisions are made, how vulnerability and autonomy are understood, and how rights and responsibilities are distributed. The study of relations in the context of health law has traditionally centred on relationships between patients and healthcare professionals, and on the limitations of an individualistic conception of autonomy. The development of concepts such as relational autonomy (Nedelsky 2012), the relational self (Herring 2019) and relational consent (Maclean 2013) has significantly enriched this field by foregrounding the social embeddedness of individuals and the importance of relationships of care.

This Special Section builds on that scholarship but seeks to broaden the enquiry. It originated from a one-day workshop titled "Relations and Health Law", hosted in October 2024 by the Healthcare Law Research Group at the University of Sussex. The workshop was organized around a deliberately expansive understanding of relations in the field of health law. Moving beyond the conventional academic focus on relational autonomy, it investigated how legal rules shape, and are shaped by, complex webs of institutional power, technological developments, professional gatekeeping and wider social structures.

However, the Special Section that emerged from those conversations is not simply a collection of workshop proceedings. Central to its editorial ambition was a commitment to bridge the divide between theoretical

* I would like to sincerely thank the editor of this issue, Maria Federica Moscati, for her invaluable advice and support in preparing and bringing this Special Section together. I am also grateful to Marie Selwood for her assistance throughout the copy-editing and proofs process.

scholarship and legal practice, bringing the insights of academic researchers into direct conversation with the professional experiences of practitioners who navigate, foster and manage these relational dynamics in practice. Therefore, the workshop provided the starting point for a broader project, in which the resulting contributions are diverse in subject matter, perspective and approach, drawing on philosophy, health law, human rights, family law, adult social care and legal practice. Despite that diversity, all contributions share a concern with what a relational perspective enables us to discern about law.

Importantly, the articles in this Special Section do not treat relations as inherently positive. Relationships can sustain care, identity, agency and belonging, but they can also distribute power unequally, reproduce social hierarchies, create dependencies and become sites through which control is exercised. Law itself is not external to these processes. Across the five contributions, law does more than regulate relationships. It can determine which relationships receive recognition, allocate authority among those involved, enable or constrain forms of care and influence whose choices, experiences and interests carry legal weight.

Opening this collection, Peter West-Oram's "Illiberal Liberty: Analysing the Hidden Harms of Conscientious Objections in Health Care Provision" examines these dynamics through conscientious objection in healthcare. Focusing on abortion and contraception, West-Oram challenges the compatibility of conscience-based exemptions with the liberal pluralist commitments through which they are commonly defended. His argument moves beyond questions of whether conscientious objection creates practical barriers to healthcare. Even where access can ultimately be preserved, he argues, state recognition of a right to refuse participation may itself wrong and harm those seeking care by legitimizing beliefs that place their reproductive autonomy and bodily integrity in a subordinate position. By legally accommodating such refusals, the state implicitly treats as reasonable the position that women's fundamental liberty rights to bodily integrity and reproductive autonomy hold secondary status to the conscience claims of professionals who have voluntarily assumed gatekeeping duties. West-Oram further traces the contemporary trajectory of "conscience creep", showing how conscience claims are increasingly expanding to justify overt discrimination based on sexual orientation and against trans people, shrinking the boundaries of solidaristic concern.

David Benbow's "Embodied, Affective and Relational Selves and Anorexia Nervosa (AN)" turns to the way in which law and academic

commentary in England and Wales conceptualize patients with longstanding and severe eating disorders, with particular attention to Court of Protection case law concerning anorexia nervosa under the Mental Capacity Act 2005. Drawing on Jennifer Nedelsky's account of the self as embodied, affective and relational, supplemented by Alasdair MacIntyre's philosophy, Benbow argues that assessments of capacity and autonomy, as well as decisions concerning the continuation or cessation of forced treatment, may be unjustifiable where insufficient attention is paid to the embodied, affective and social conditions in which that individual exists. Of particular importance is his extension of relational analysis beyond immediate interpersonal relationships. Stigma, access to treatment, gaps in professional awareness and training, resource constraints and the cultural valorization of thinness form part of the social environment within which illness develops and legal decisions are made. While acknowledging that stopping forced treatment can be justified where treatment is considered non-beneficial or inappropriate, Benbow argues that characterizing continued treatment as "futile" without addressing these embodied, affective and broader social realities risks reifying patients as untreatable, medicine as static and anorexia nervosa as purely metabolic.

My own contribution, "Care without Status: Intended Mothers in the ECtHR's Surrogacy Jurisprudence", examines another dimension of law's constitutive role. Situated at the intersection of health and family law, surrogacy brings assisted reproduction, pregnancy and childbirth into direct contact with legal parenthood and relational recognition. Through a feminist anti-stereotyping analysis of the European Court of Human Rights' surrogacy case law, the article argues that gestation and birth continue to operate as the normative baseline of legally self-evident motherhood. Consequently, an intended mother's reproductive intention has limited constitutive force, leaving non-gestational maternal claims dependent on the child's European Convention on Human Rights Article 8 rights, the legal position of the genetic intended father and domestic mechanisms such as adoption. This also exposes her reproductive project to both regulatory and normative scrutiny. The article demonstrates how apparently neutral legal reasoning may reproduce gendered hierarchies. It introduces "care without status" and develops "derivative motherhood" to capture, respectively, the disjunction between maternal caregiving and legal status, and the mediated structure through which intended motherhood is recognized. By naming this structure of legal dependency, the article reveals that the treatment of intended mothers is not merely

an issue of parenthood recognition, but a gendered process in which some forms of motherhood are treated as legally self-evident while others remain conditional upon external validation.

Questions of legal recognition and relational practice are taken in a different direction by Sylvie Armstrong and Melissa Elsworth in "A Relational Approach to Surrogacy and Assisted Reproduction: Opportunities and Limits in Legal Practice". Writing from the perspective of legal practitioners, Armstrong and Elsworth consider what adopting a relational approach actually requires of lawyers working with surrogacy. They examine the practitioner's role at three stages: creating and maintaining relationships between adults, validating or legalizing parental relationships, and managing conflict where it arises. Their analysis demonstrates both the possibilities and limits of law as a mechanism for supporting relationships. Legal practitioners may facilitate communication, clarify expectations and help secure recognition, while the adversarialism and rigidity associated with conventional legal processes may sit uneasily with relationships that are dynamic and often oriented towards a shared objective. The article consequently looks both to legal reform and to professional best practice. While the former can address restrictions on professional support, such as drafting and advising on surrogacy agreements, the latter depends on practitioners working collaboratively across disciplines, communicating flexibly with clients and other participants, and making creative use of mechanisms, such as mediation, in relational contexts whose dynamic character may not fit conventional legal models.

The importance of the practitioner as an actor in shaping legal intervention is also central to Bethane Harland and Iko Onuh-Goddard's "Autonomy and the Lawyer's Role: Enabling Choice or Exercising Control? Insights from Adult Social Care Practice". Drawing on their experience as local authority solicitors, the authors examine the difficult boundary between respecting autonomous choice and intervening to protect adults from harm. Mental capacity, safeguarding, coercion, dependency and risk are encountered not as abstract categories but within the complexity of people's lives and relationships. The authors also examine the tension between protection and liberty in deprivation of liberty cases, considering the impact of the UK Supreme Court's recent decision in *AGNI* (2026), which favoured an evaluative assessment of the individual's concrete situation, wishes, feelings and consent. The overarching question in this contribution is what role lawyers themselves play in determining how those circumstances are translated into legal action. It argues that advising requires both identifying whether a lawful power to intervene

exists and critically assessing whether intervention should occur at all, through scrutiny of the evidence, necessity, proportionality, the individual's wishes and the availability of less restrictive alternatives. Thus, legal advice becomes one of the sites at which the boundary between protection and control is negotiated in practice.

Taken together, these contributions show that a relational approach to health law requires attention both to interpersonal bonds and the structural dynamics that shape them, such as gender, professional authority and institutional power. Recurring themes connecting the articles include the distribution of power over who defines risk and status, the constitutive role of law in shaping relationships and allocating authority within them, and the gap that can emerge between abstract legal categories and lived experiences of care, dependency and decision-making. Running through these themes is the role of legal and professional actors in mediating questions of authority, recognition and intervention. In several contributions, this takes the form of gatekeeping: conscience exemptions may privilege healthcare professionals' moral claims over patients' reproductive autonomy; clinical and judicial assessments of capacity and futility shape treatment decisions for patients with anorexia nervosa; domestic rules and Strasbourg's legal reasoning gatekeep parental recognition in surrogacy, leaving intended motherhood dependent upon forms of external validation; and adult social care lawyers help shape how risk is framed and whether protective intervention should be pursued. Armstrong and Elsworth offer a related but distinct perspective, presenting legal practitioners in surrogacy principally as relational facilitators who support relationships and legal recognition within the constraints of statutory rules and adversarial processes.

As this Special Section demonstrates, law and legal practice help determine how relationships are understood, which are recognized or obscured, whose interests and choices carry legal weight, and how authority is distributed. In bringing these dynamics into view, these articles demonstrate the value of relations as a critical lens through which health law can be reconsidered. I hope that the diverse contributions to this Special Section stimulate further engagement with relations and health law both within and beyond academia.

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Illiberal Liberty: Analysing the Hidden Harms of Conscientious Objections in Health Care Provision

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Abstract

The right to conscientious objection, and the extent of the entitlements it grants to rights holders, has become progressively more controversial due to the growing range of contexts in which the right is asserted or defended and the corresponding growth in the range of persons making, and affected by, such claims. In this paper, I examine the extent to which a right to conscientious objection in health care is compatible with the liberal pluralist commitments upon which the right allegedly rests. I focus on conscientious objections to duties to participate in the provision of abortion and contraception and argue that granting health care providers exemptions to duties to participate in the provision of such services causes wrongful harm to women, even under idealized conditions designed to preserve access to these health care services.

Keywords: conscientious objection; abortion; contraception; liberal pluralism; rights to health care; ideological freedom.

[A] INTRODUCTION

While rights are sometimes characterized as providing absolute guaranteed entitlements of enjoyment of particular goods, such enjoyment is instead typically contingent upon multiple factors, most often the impact that the exercise of a right will have on other people (Mill 1966: 100-101). This is the case even for rights seen as "basic" (Shue 1996) or otherwise fundamental, as Berlin notes when discussing the importance of restricting rights to personal freedom, for example (Berlin

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1971: 124). Thus, states are argued to be entitled, and even obliged, to establish institutions to limit the exercise of certain rights in order to promote their enjoyment more generally (Raz 1986: 417; Rawls 2005: 32). How states choose to do this, which rights they constrain, and which they do not, therefore reveals something significant about both the perceived value of the right in question and the perceived status of the people whose rights are and are not so constrained. In some cases, constraint is universal, and its burdens shared by all persons foregoing only relatively minor entitlements to act in ways which would impose significant harms upon other people. Speed limits constrain our freedom to drive as fast as we might like, for example, but in so doing protect us all from significant risk of harm (Mill 1966: 100-101; Makowsky & Stratmann 2011). In other cases, states must choose which persons' rights claims they will support or prioritize and which they will not. In some such cases, the decision to prioritize the fulfilment of one specific (type of) rights claim over another will simultaneously also affirm a decision about the status of the persons whose rights are not prioritized. This may not always be wrongfully discriminatory and may sometimes be necessary and appropriate, such as the decision not to fulfil one person's non-basic right claim because it would preclude fulfilment of another's basic right (Shue 1996; West-Oram 2026). However, in certain iterations of this kind of case, a state's decision to prioritize the fulfilment of one type of rights claim over another will wrongfully and harmfully erode the moral and political status of the person(s) whose rights are not prioritized. It is with this category of state decision that I am concerned here.

In this paper I examine the extent to which the right of health care providers to conscientiously object to duties to participate in the provision of contraception, particularly intrauterine devices (IUDs) and emergency hormonal contraception (EHC), and abortion[1] is compatible with the commitments of political liberalism upon which the right is

[1] As I discuss in section [H], while appeals to conscience are increasingly made in an ever-wider range of contexts, I focus on abortion and contraception here due to the ubiquity of objections to these health care services, and the increasing frequency with which they are made. Abortion and contraception are seen by some, despite their importance as basic health care services, as immoral because they are alleged to be equivalent to murder – the victim in this case being the foetus or embryo that is destroyed or prevented from implanting in the uterus by their use (Marquis 1989: 183; West-Oram 2013; West-Oram & Buyx 2016; West-Oram & Nunes 2021).

claimed to rest.[2] I argue that legislation granting health care providers "conscience based exemptions (CBEs)" (Neal & Fovargue 2016: 544) to duties to participate in the provision of such services both wrongs and harms patients, even under idealized, hypothetical conditions designed to preserve access (Brock 2008: 194). My goal is to show how, despite the importance of rights to freedom of conscience, such legislation is inherently harmful and wrongful when applied to the provision of certain kinds of health care regardless of whether access to these services is constrained in any way. In doing so, I also show how appeals to the right to conscientious objection are increasingly used to deny the moral status of already marginalized people and exclude them from the group of primary social and political concern. I argue, therefore, that the expansion of the right to conscientious objection thereby radically changes the nature of the relationships between patient and doctor, and between patients and their community. In each case, situating patients seeking abortion and/or contraception in a subordinate social, legal, and political role, in which they hold second-class status to their community and/or physician, both of which are elevated to hold moral authority over what the patient may decide happens to her body.

With this aim in mind, in the following section I first provide a brief overview of the recent legislative and jurisprudential history of the medical conscientious objection debate. Having done so, in section [C], I then explore the key arguments surrounding the significance and role of conscientious objection in its wider social and political context. I do so with reference to the core liberal–pluralist framing around which recent arguments in favour of broad rights to conscientious objection are constructed. In section [D], I consider these arguments in light of the significance of the kinds of health care services most often subject to conscience claims, most specifically contraception and abortion, and argue that these services represent essential components of the fulfilment of important liberty rights. In section [E], I outline and expand on one approach to resolving the apparent conflict between rights to freedom of conscience and rights to reproductive autonomy and bodily integrity—the "conventional compromise" (Brock 2008: 187). In sections [F] and [G], I consider the implications of perfect fulfilment of this enhanced "conventional compromise" and argue that, because of the significance

[2] Importantly, the author is a philosopher, rather than a lawyer, and this paper focuses on the moral and philosophical implications of current and proposed legislation, rather than the letter of the law itself. For this reason, I use examples from a range of legal jurisdictions in both North America and Europe to illustrate my argument. These jurisdictions were chosen as they ostensively share broadly similar liberal–pluralist foundations to their rights-based legal frameworks and because similarly grounded claims have been made in each jurisdiction about the supposed primacy of rights to conscientious objection over other rights claims.

of at least certain kinds of health care, conscientious objection to those services is incompatible with the liberal–pluralist principles upon which the right to conscientious objection is claimed to rest. Finally, in section [H], I note the increasingly broad range of ways that appeals to conscience are used in attempts to justify not merely refusal to provide contested services, but also active discrimination against members of a range of marginalized and stigmatized communities. In doing so, I note the expansion of appeals to conscience in the legislative and litigative domains and explain the ways that it is used to deny the moral status of targeted communities and exclude them from solidaristic concern.

[B] CONSCIENCE IN CONTEXT

In 2010, then United States (US) President Barack Obama signed the Patient Protection and Affordable Care Act (PPACA) 2010 into law, representing a paradigm shift in the landscape of American health care provision. While the PPACA fell short of enacting universally accessible, government-administered health care, it nevertheless imposed new standards on health insurance providers, with the intention of improving access to health care for poorer people and those with pre-existing health conditions (West-Oram 2013: 237-238). The PPACA did not, however, pass without controversy, with one of its most contentious aspects being the requirement that all insurance schemes had to provide coverage for prescription medicines, including birth control and emergency contraception (though importantly not abortion) (PPACA 2010, section 1302(b)(1); West-Oram 2013: 239). This was seen as particularly controversial, in part because it required employers and insurance scheme enrollees to contribute indirectly through payment of their insurance premiums to funding services which they may believe to be immoral. This controversy fuelled a range of lawsuits against the government, each of which sought to overturn, or allow exceptions to, these obligations on grounds of conscience, alleging that duties to participate in providing various forms of reproductive, sexual health, and gender-confirming care violated the rights of plaintiffs to freedom of religion (West-Oram 2013; West-Oram & Buyx 2016; Liberman 2017; West-Oram 2018).

While the debate surrounding conscientious objection in the health care context is particularly fierce in the US, it is increasingly relevant in other countries. For example, in the United Kingdom (UK), a Bill intended to significantly expand the rights of health care workers to conscientiously object to participating in the provision of contested services passed its first and second readings and reached the committee stage of review in the House of Lords although it did not progress further and was not enacted

(Conscientious Objection (Medical Activities) Bill [HL] 2018; West-Oram & Nunes 2021). Also in the UK, two midwives were (after a lengthy court case) denied the right to exempt themselves from administrative duties tangentially connected to the provision of abortions (*Greater Glasgow Health Board v Doogan* 2014). In this case, the plaintiffs' opposition was not to having to answer telephones or complete paperwork *per se*, but rather to having any role at all in a causal chain which would lead to abortions being acquired. Here, the plaintiffs were unsuccessful (after multiple appeals) in their claim because it was held that accommodating their asserted right to conscientious objection would place unreasonable burdens on their colleagues. It was also noted in the judgment that the obligations to which the plaintiffs objected were not merely professional expectations, but also legal obligations (*Greater Glasgow Health Board v Doogan* 2014: paragraph 40). Similarly, in Sweden two nurses (unsuccessfully) sued their local health authorities on grounds of unfair discrimination because they were denied employment as midwives due to their refusals to participate in the provision of abortions (BBC News Online 2017; *Grimmark v Sweden* 2020; *Steen v Sweden* 2020). Notably, Sweden is relatively unusual in that it does not permit health workers a right to conscientious objection, instead handling requests for exemptions on a case-by-case basis (Munthe 2017; Clarke 2026: 514). The defendants in each case argued that the plaintiff was free to pursue alternative employment, but that as midwives they had professional and legal duty to provide abortions when requested by patients, which they each stated they would refuse to fulfil. The cases were eventually considered by the European Court of Human Rights, which rejected all claims made by the plaintiffs (BBC News Online 2017; *Grimmark v Sweden* 2020; *Steen v Sweden* 2020). It is notable that the court found in *Grimmark* that while Article 9 of the European Convention on Human Rights (ECHR) does guarantee a right to freedom of religion, that right is not absolute and can be restricted under certain circumstances (*Grimmark v Sweden* 2020: paragraph C).

The assertions of the right to conscientious objection discussed in this section are each grounded in the belief that liberal–pluralist commitments to liberty and equality entitle claimants to avoid, potentially even very distant, involvement in the provision or use of goods that they believe to be immoral. In each case, it was argued that to require such participation would deny claimants the right to act in accordance with their personal moral codes (Pellegrino 2002: 226, 239; LaFollette & LaFollette 2007: 251), unjustifiably restricting their autonomy, and denying their moral status as autonomous agents and equal members of society. Requiring

rights holders to "violate their personal moral or religious beliefs" (Stein 2005) in this way was argued to be discriminatory and constitute an unjustified restriction on an important personal freedom which liberal states are argued to have an obligation to preserve (Rawls 2005: xvi).

However, as I discuss in more detail in the following section, liberal–pluralism is not committed to allowing absolute freedom for all moral perspectives which do not align with legal or professional standards and expectations of behaviour, particularly when those perspectives lead to actions which impose on the ability of other persons to live free, autonomous lives (Mill 1966: 100-101; Berlin 1971: 124; Raz 1986: 417; Zohar 2003). As with other personal liberty rights, the right to conscientious objection is not absolute and does not trump all other considerations in all circumstances, some compromise is both inevitable and necessary. To illustrate this point, Julian Savulescu has argued that it is unlikely that we would accept as valid a physician's refusal to treat elderly patients because she believed that they had had a "fair innings" (2006: 295). Savulescu's point is that, while a commitment to the fair innings argument may be no less sincere than the opposition to abortion, this does not justify allowing physicians to refuse treatment to elderly people on grounds of conscience. Generally speaking, we simply do not take the right to conscientious objection to entitle us to opt out of any and all duties to which we assert an objection.[3] Indeed, the UK Equality Act 2010 prohibits discrimination on the grounds considered by Savulescu because such refusal is seen as inegalitarian and discriminatory. While liberal states typically do recognize and protect personal liberty rights, and freedoms from obligations to do things we believe to be immoral, these guarantees are not absolute, as I discuss in detail in the following section.

[C] LIBERAL–PLURALIST COMMITMENTS TO FREEDOM OF CONSCIENCE

The appeals to conscience discussed in the previous section are directly derived from a narrow definition of the basic principles of classical liberal–pluralism, the primary concerns of which are taken to be the preservation of the liberty of individual persons (Mill 1966: 101; Nozick 1999; Courtland & Ors 2026) and the recognition of their fundamental moral and political equality (Sandel 1998: 67-69; Young 2002: 39). As a consequence of this concern for the preservation and promotion of these

[3] For example, pacifists are not typically entitled to withhold that portion of their tax contributions which would normally be spent on the military.

goods, it has been argued that liberal states are committed to neutrality between incompatible or competing moral perspectives (Raz 1986: 110; Sandel 1998: 10; Rawls 2005: xvi). This neutrality is argued to ensure that citizens are able to live autonomous lives, and enjoy recognition as morally equal agents who are members of a shared community (Raz 1986: 110; McKinnon 2005: 60–61). The commitment to state neutrality is derived from the importance of autonomy (Berlin 1971: 126; Raz 1986: 413) and the liberal commitment to the preservation of individual liberty and equality (Berlin 1971: 171; Raz 1986: 373, 400), and is argued to thereby entail a right to freedom of conscience—a right to believe what one wishes and live according to those beliefs. For a state to fail to adhere to this commitment, by endorsing and enforcing compliance with a particular "comprehensive doctrine" (Rawls 2005: 39) is, it is argued, to fail to respect the autonomy of its citizens, unjustifiably restrict their individual freedom, and deny their equal moral status and authority to make private choices under the law (Sandel 1998: 10; Rawls 2005: 37; McKinnon 2005: 62). Such denials of autonomy, liberty, and equality are argued to constitute a significant harm to those denied these goods (McKinnon 2005: 67), which is sufficient to justify the requirement that states maintain a position of political neutrality between various incompatible moral doctrines (Raz 1986: 413, 425). Consequently, the liberal commitment to individual freedom and equality precludes the state (or any individual) from compelling adherence to any given "conception of the good life" (Raz 1986: 111). Liberal democratic states are therefore argued to be (or at least have an obligation to be) innately pluralist (McKinnon 2005: 68; Rawls 2005: xxxvi) and to have responsibilities to ensure that citizens are free to pursue their own conception of the good life (Raz 1986: 111; Rawls 2005: 30).

Despite (or perhaps, because of) the commitment to the promotion of individual freedom, it is important to acknowledge that liberal–pluralist understandings of justice do simultaneously support state responsibilities to establish political structures (Dworkin 2002: 141), or "basic institutions" (Rawls 2005: 39), which are necessary for the preservation of individual freedom and equality and which enable citizens to privately pursue a "valuable autonomous life" (Raz 1986: 417-418). The imposition of limits on personal freedom is thus an inherent feature of liberal–pluralism and enables adherents of different ideologies to achieve "their cherished goals without thwarting [each] other" (Lamprecht 1921: 232; Rawls 2005: 32). Refusal to accept such limitations, through asserting absolute rights to ideological freedom and personal liberty, can thus deny other persons their own rights to freedom of conscience (Berlin 1971: 124) and reject

the liberal–pluralist principles upon which rights to freedom of conscience are grounded. The imposition of reasonable limits on the freedom to live in accordance with freely held beliefs in the absence of state interference is thus intended to both maximize the ideological freedoms enjoyed by all persons and prevent the emergence of a quasi-Hobbesian context in which persons with competing ideologies are in a state of constant conflict (Lamprecht 1921: 234; Berlin 1971: 123; Zohar 2003: 126; Rawls 2005: 38; Eyal & Gosseries 2013).[4]

The importance of institutions which preserve liberty generally, and the need for mass participation in their delivery and preservation, has led some theorists to argue that liberal justice does not merely require passive toleration of the freedom of others to pursue lives of their own choosing, it can also require rights holders to actively cooperate with policies that they may oppose (Zohar 2003: 122; Rawls 2005: 16, 55). This "active cooperation" requirement is, according to Noam Zohar, a fundamentally necessary part of liberal, democratic politics and an essential feature of living in society with other persons (Zohar 2003: 128). Echoing the points above, ensuring that all persons are able to live according to their moral principles, and thus respect their equal entitlement to such freedoms, may require individual cooperation with the delivery of institutions which protect and promote such freedoms, even when we may hold that cooperation to be incompatible with our personal moral code (Rawls 2005: 39; Dworkin 2002: 141). In this way, for a state to allow a conscience exemption (that is, an entitlement to be released from an otherwise applicable professional or legal duty) in any given situation is for it to endorse it as within the realm of reasonable liberal discourse, the principles upon which it is grounded. It is worth emphasizing here that this is not a point about states legislating what people are allowed to think but, rather, about which professional or legal obligations people are permitted to refuse, based on what they think. For a state to legislate on what people believe is a very different, and arguably far more intrusive and concerning, thing than legislating on how people are permitted to behave based on what they think. I discuss this point in more detail in section [G]. First however, in the following section, I discuss the significance of the kinds of health care services often subject to conscientious objection claims in health care and explain their importance as fundamental components of important liberty rights.

[4] And, indeed, to prevent an anarchic context in which conscience claims are so common as to make the delivery of any social structures or public goods impossible (Zohar 2003: 128).

[D] CONTRACEPTION, ABORTION, AND INDIVIDUAL LIBERTY

Contraception and abortion enable women[5] to avoid, prevent, or terminate an unwanted or unsafe pregnancy (Estrich & Sullivan 1989: 130; Neff 1990: 327-328, 352; McDonagh 1998: 1074; Purdy 2006: 287; Shahvisi & Finnerty 2019), empowering them to protect themselves from the health risks, and restrictions on liberty, associated with pregnancy and childbirth (West-Oram & Buyx 2016: 337; Committee on Preventive Services for Women 2011; Sonfield & Ors 2013). Consequently, these goods should be considered basic health care services, since they help to manage and reduce serious health risks. Further, access to these goods should be acknowledged as a necessary prerequisite for women to enjoy their rights to reproductive autonomy and bodily integrity, each of which are fundamental liberty rights, since in the absence of rights to contraception and abortion the ability to control fertility and decide what happens to and in one's body is severely curtailed.[6] The right to bodily integrity is simply a right to control what happens to one's body (Estrich & Sullivan 1989: 126), while the right to reproductive autonomy is a right to freely make reproductive choices, based on one's personal moral commitments and life goals (Freedman & Isaacs 1993: 19; Purdy 2006: 287). These rights are closely related, and both are fundamentally important liberty rights, which add weight to arguments in favour of the accessibility of abortion services and contraception (Lindemann 2009: 43). This is not a new claim but it is worth noting this importance here as a foundation for the rest of my argument (Conscientious Objection (Medical Activities) Bill [HL] 2018).

The noted rights enable women to freely make reproductive choices (Purdy 2006: 287) and thus control what happens to their bodies (Lindemann 2009: 43). They are thus "fundamental to [women's]

[5] I recognize that the term "woman" relates to a specific gender, and that non-binary people and trans men may also become pregnant, and thus be affected by conscience-based refusals to provide contraception and abortion by health care providers, in addition to other forms of discrimination (as I discuss in more detail in section [H]). However, in the interest of brevity, and to reflect the literature, legislation, and jurisprudence surrounding the conscience debate, I use the word "woman" to denote the class of persons affected by such refusals, following Shahvisi and Finnerty (2019).

[6] While it might be argued that sexual abstinence would have the same result, this ignores the fact that to require abstinence as an alternative to pregnancy is simply to allow women's biology to impose a different set of restrictions on their autonomy. Namely, that the ability to become pregnant is sufficient grounds to limit what women are entitled to do with their bodies—it is to deny the freedom to have sex without risking pregnancy. Further, it is to ignore the fact, noted above, that some serious risks of pregnancy only become apparent during a pregnancy, meaning that abstinence would not protect women from the risks of a wanted pregnancy.

intellectual, psychological, and economical development. [They are] the foundation of individual control and self-determination" (Neff 1990: 353). Consequently, the freedom to control one's body is "a central condition of personhood" (Buchanan & Ors 2000: 216), meaning that actions which restrict access to contraception and abortion undermine liberty rights of fundamental importance to women's freedom and autonomy. Importantly, those without female reproductive systems, most notably cis gender men, do not live under the same constraints, meaning their need for medical assistance in controlling fertility is less extensive than that of women (Purdy 1990). Denial of these rights, and obligating women to continue pregnancies they may wish to end, thus reduces women to things which can be used by other people (Estrich & Sullivan 1989: 127; McDonagh 1998: 1061; McLeod 2002: 2-3), denies their status as citizens of equal moral standing (Sandel 1998: 67-69; Young 2002: 39), and restricts their ability to participate fully and freely in society (Thomson 1971; de Gama 1993: 117–118; Freedman & Isaacs 1993: 19; Wynn & Ors 2007: 254). Therefore, actions which restrict access to contraception and abortion do not merely impose restrictions on the availability of a commercial good; rather, they undermine liberty rights of fundamental importance to women's freedom and autonomy.[7]

This position has been articulated forcefully by Judith Jarvis Thomson, who argues that the rights to bodily integrity and reproductive autonomy entitle women to abortions, regardless of the moral status of the foetus (1971). This is because denying access to abortion imposes an obligation on pregnant women to incur the significant costs of allowing another "person" (the foetus, assuming it qualifies as a person) to use their body without their consent—a significant imposition on the liberty of pregnant women (Thomson 1971; Lindemann 2009: 43). Given that we do not acknowledge an obligation to donate the use of our organs or bodily tissue to persons who are currently physically independent of us but who are in need of the use of those organs to survive, it is unjustifiable to require women to grant the use of their organs to a foetus who is not physically independent of them, *even if* the foetus is a person (Thomson 1971: 48-49; de Gama 1993: 117). Consequently, Thomson argues that women cannot be required to carry a pregnancy to term against their will (Thomson 1971: 66). Requiring that they do so violates their rights to bodily integrity and reproductive autonomy, reduces them to things which can be used by other people (Estrich & Sullivan 1989: 127; Purdy

[7] It might be argued at this point that granting conscience exemptions to health care providers opposed to contraception and abortion does not restrict the accessibility of those goods. I discuss this claim below.

1990: 278; McDonagh 1998: 1061; McLeod 2002: 2-3), denies their status as a citizen of equal moral standing, and restricts their ability to participate fully and freely in society (Freedman & Isaacs 1993: 19; de Gama 1993: 117-118; Wynn & Ors 2007: 254; Lindemann 2009: 43). This argument also applies to contraception, arguably with even greater force, since contraception prevents pregnancy, and thus avoids even the potential for any conflict between the rights claims of foetus and woman (allowing for the sake of argument that foetuses can have rights).

The issue at the heart of the debate surrounding the right of health care providers to exempt themselves from duties to participate in the provision of contested services is therefore a conflict between two important liberty rights—to freedom of conscience and to the freedom to control one's body. Each of these rights guarantee psychological, cognitive, and/or physical freedoms and are thus central to the ability to live a life of one's own choosing. Resolving conflicts between these rights is challenging, since to prioritize either one over the other may appear to impose significant harms on the holders of those rights assigned lower priority. Therefore, it seems that it is not possible, if the claims of both providers and patients are accepted at face value, to adequately respect all competing liberty rights in the context of conscientious objection in health care—one party must inevitably have their liberties restricted. I discuss one possible response to the seeming intractability of this problem in the following section.

[E] A "CONVENTIONAL COMPROMISE"

One approach to resolving the tensions noted in the previous section is reflected in UK law governing abortion. Under the Abortion Act 1967 health care providers who assert a conscientious objection to abortion may exempt themselves from duties to participate in its provision, though cannot do so in circumstances where abortion is necessary to save the life of the pregnant woman, or to protect her from "grave permanent injury to … physical or mental health" (Abortion Act 1967, sections 4(1) and 4(2)). Correlatively, ethical guidelines provided by the British General Medical Council (GMC) allow physicians to conscientiously object to contested practices, but require them to inform patients (preferably in advance) that they do not provide the service, refer them to another provider, and ensure that patients are not left "with nowhere to turn" (2024: paragraph 15). Further, UK British Supreme Court's ruling in *Doogan* affirmed that rights to conscientious objection should be understood to only apply to direct participation in the provision of contested services, rather than the provision of wider "ancillary, administrative and managerial tasks" (*Greater Glasgow Health Board v Doogan* 2014: paragraphs 37-38), a

position also reflected in multiple other jurisdictions (Domenici 2021: 39-40).[8] This approach, wherein rights to exemption are conditional rather than absolute, has been described by Dan Brock as the "conventional compromise" (Brock 2008). Under this approach, consideration is given to establishing whether and to what extent granting conscience exemptions to objecting health care providers will impact on clients, non-objecting providers, and society as a whole. Where granting conscience exemptions will have relatively minor costs, they are often taken to be easier to justify (Kelleher 2010).[9]

This approach to granting rights to conscientious objection is argued to be a "moderate" solution to the problem of preserving freedom of conscience whilst also safeguarding rights to essential health care services (Kelleher 2010: 291). Ensuring the continued accessibility of contested services through duties to refer, and prohibiting exemptions where their assertion would cause significant harm, is thought to maintain state neutrality between incompatible moral perspectives, minimizes the extent to which objecting providers are required to participate in the provision of services which they believe to be immoral thereby respecting their right to freedom of conscience, and avoids the imposition of harms caused by material deprivations of contested services on clients (Kelleher 2010: 291). Costs are seemingly borne by both parties when the conventional compromise is enacted, but these are minimized significantly. This becomes especially clear when compared to the alternatives at either end of the spectrum—compulsory provision by providers (no right to conscientious objection at all), or no duty to inform or refer (an absolute right of conscientious objection).

However, as I argue below, state endorsements of conscience exemptions to duties to participate in the provision of contraception and abortion impose hidden, yet significant, harms on women, and therefore violate the liberal commitment to state neutrality between competing moral paradigms. Importantly, this is the case *even if* the following additional counterfactual (and unrealistic) conditions hold in each case of conscientious objection:

[8] Though, as I discuss in section [H], this understanding is also explicitly rejected in other jurisdictions.

[9] It is important to note, however, that, given that the efficacy of EHC is dependent upon how quickly it can be taken, alternative systems of provision must be readily available to women, and must not entail significant waiting periods, if they are to qualify as imposing only minor costs on women.

1 Referrals will not impose *any* additional costs on either clients or non-client third parties, such as non-objecting providers, or the state.

2 Conscientious objectors will provide false, but plausible and believed, statements to justify why they "cannot" provide a good at a given time (that is, providers will lie about why they "cannot" provide a service to which they object).

These stipulations are both unrealistic and highly demanding. However, by specifying such counterfactual conditions of this enhanced conventional compromise (ECC), I aim to eliminate any overt or direct harm caused by protecting rights to conscientious objections of the kind endorsed by the objectors in the given examples. If alternative provision is *immediately* available, and access to the contested goods is not restricted, providers and clients both appear to get what they want, and costs of providing that care are not imposed on third parties. Equally, if clients remain unaware that they are being denied a service by a particular provider for discriminatory reasons, they avoid immediate, dignitary harms caused by expressions of discriminatory attitudes (McLeod 2002: 12). However, as I argue below, even assuming perfect fulfilment of the ECC, a significant wrongful harm is still inflicted upon women.

[F] STATE ENDORSEMENTS OF CONSCIENTIOUS OBJECTIONS—THE SOURCE OF HIDDEN HARMS

Under idealized circumstances in which the ECC is fulfilled perfectly, providers avoid direct involvement in actions they believe to be immoral, though they retain some responsibility to assist their clients (West-Oram & Buyx 2016: 341-342). Correlatively, clients retain the ability to access contested services and avoid the dignitary harms and additional costs associated with conscientious refusals. However, as I argue in the rest of the paper, significant wrongful harm is still inflicted upon women, even those who do not ever seek access to contraception or abortion, by state support for rights to conscientiously object to the provision of those services. This harm is independent of the dignitary harms of refusal and the "inconvenience" (Fenton & Lomasky 2005; McLeod 2010) of accessing alternative provision, which are each addressed by the ECC. Instead, the harm with which I am concerned is inflicted by the state's endorsement of the right to conscientiously object to duties to participate in the provision of abortion and contraception.

Elizabeth Fenton and Loren Lomasky argue that conscientious refusals by pharmacists to dispense emergency contraception only impose inconvenience on their clients, rather than inflicting actual harm (2005). In response, Carolyn McLeod argues that such refusals do in fact cause harm because, in a sexist and racist social context in which women must endure "inadequate protection from sexual assault and poor access to abortion services", permitting pharmacists to conscientiously object to providing emergency contraception expresses disrespect towards women, by "confirm[ing] to her that her society does not respect her ability to decide what happens to her own body" (McLeod 2010: 20). Given that women "have an interest in not feeling this way", McLeod argues that "[c]onscientious refusals that violate this interest harm women" (McLeod 2010: 20) by undermining their sense of security in being able to make choices about their bodies. McLeod also argues that conscientious refusals may also inflict additional dignitary harms upon women, potentially reducing use of emergency contraception. I do not discuss these dignitary harms further here as they would, as I stipulated above, be prevented by the ECC (Free & Ors 2002; Shoveller & Ors 2007; McLeod 2010: 16-18, 20).

McLeod does not go as far as to suggest that these harms are definitively *wrongful* (ie that they are a normative harm) (McLeod 2010: 17), adhering instead to Joel Feinberg's definition of harm as a "non-normative setback to interests" (McLeod 2010: 17). Consequently, she is open to the idea that it *may* not be wrong for pharmacists to cause these harms by refusing to dispense emergency contraception on grounds of conscience (McLeod 2010: 21). I broadly agree with McLeod's analysis of the *origins* of the harm caused by conscientious refusals to dispense emergency contraception (and by extension other forms of contraception, and abortion). However, I do wish to extend her argument here and show how the harms inflicted by conscientious objections to the provision of emergency contraception, and by extension to abortion and other forms of contraception more broadly, are in fact wrongful as well as harmful.

I argued in section [C] that when a state grants rights to conscientious objection in a given context it implicitly endorses as within the sphere of reasonable discourse the exemption, its costs, and the beliefs upon which the conscience claim is based. This is not to say that the state accepts that those beliefs are true, valid, or moral, but merely that they are not so outrageous or dangerous that respecting them, through the granting of conscience exemptions, would infringe upon respecting other important liberal values. For example, conscientious refusals to serve in the armed forces are typically permitted, but, in the UK at least, we do not

(yet?) allow racist, transphobic, homophobic, or misogynistic teachers to conscientiously object to duties to teach members of persecuted groups on grounds of conscience, precisely because such beliefs are incompatible with prior commitments of liberalism such as respect for equality and individual liberty (Equality Act 2010).

Conversely, rights to conscientiously object to duties to provide contraception and abortion are commonly granted. Given that rights to conscientious objection are conditional upon state approval, for a state to endorse rights to conscientiously object in this context is for it to endorse as within the realm of reasonable disagreement the principles upon which the claimed right is grounded. Therefore, since abortion and contraception are prerequisites for the fundamental liberty rights to reproductive autonomy and bodily integrity, for a state to grant conscience exemptions to the provision of these services is to accept as reasonable the belief that women do not or should not enjoy the same entitlements to these rights as men. It is also, therefore, to endorse as reasonable the belief that women should have a secondary or inferior, and significantly less free, status than men, and implies that the reproductive autonomy rights of affected clients are of less importance than the rights of providers to *actively* deny the entitlements of clients to have such rights.

This is the hidden harm that is caused by states' granting health care providers conscience exemptions to duties to participate in the provision of abortion and contraception. By granting such exemptions, states implicitly classify women's rights to control their bodies as being, at best, a secondary concern when compared to the rights of health care

professionals to opt out of voluntarily undertaken duties.[10] At worst, the actions of the state deny the fundamental moral status of women by implicitly accepting, as within the scope of reasonable pluralist discourse, the claim that women lack rights to control their own bodies and endorse this position as being compatible with the egalitarian commitments of liberal pluralism.

This harm is not merely a "non-normative setback to interests" *qua* Feinberg (McLeod 2010: 16) but rather a deep and lasting injury to its victims. Accepting as reasonable the belief that women should not have rights to control their bodies is to accept that they hold secondary moral status to men—a fundamental denial of their moral and political status, and a significant moral *wrong*. Further, and contrary to McLeod's claim, this hidden harm would occur even in the absence of systemic gender oppression because in and of itself it is a formal state endorsement of an inherently discriminatory and dehumanizing attitude. Even if women were not subject to systemic oppression and states established systems which meant that the exemptions granted to objecting providers would have no impact on the lives of their clients, the state would still be asserting that the conscience claims of the objecting providers are minimally compatible with liberal pluralism, in a way that racism, homophobia, or other forms of discrimination are not.

[10] A potential way for states to avoid this kind of harm (for which I am grateful to an anonymous reviewer), might be argued to be for states to avoid granting formal, legal rights to conscientious objection, but to refrain from preventing employers and their employees from agreeing to contracts which include conscientious objection entitlements. In this hypothetical, the state is not involved in directly affirming any conscience claims, so arguably avoids inflicting the kind of wrongful harm discussed above. However, it does not seem obvious that this suggestion removes the problem with which I am concerned in this paper because, for an employer to be able to offer such contractual terms, it must have first been allowed to do so by the state. That is, in permitting contractual rights to conscientiously object (CRCOs) to the provision of contraception and abortion, the state has made the same affirmation here that it does when legislating for such rights—that women's rights to decide what happens to their bodies are (or can be made) contingent upon the discretion of health care workers and their employers. While it may be argued that this is a decision to be made between an employer and potential employee, without implying state endorsement of any agreement reached, this claim should be considered carefully. For a state to allow CRCOs to the provision of abortion and contraception (or another service) but not others, is for it to make a value judgement about the legitimacy of different kinds of objection and the principles on which they are grounded, and of the significance of the rights such objections affect—it seems just as implausible, for instance, to suggest that we should accept a CRCO in the example suggested by Savulescu (2006) above, of the doctor who wished to refuse treatment to older patients, as it does to suggest that we should legislate to permit that objection. While the state's infliction of wrongful harm is done here indirectly, it is of the same kind as that caused by direct legislative action by the state, which at least tacitly approves the authority of employers to contract in this way (and, of course, the employer then directly inflicts that harm). Of course, were a state to permit CRCOs in all cases, it may be possible to avoid this problem, but we would then run into the practical, Hobbesian anarchy problem discussed in sections [C] and [G].

Importantly, this denial of status occurs regardless of whether alternative methods of provision are immediately available, and to women who never seek access to the health care in question, because it occurs at the level of state *policy*, rather than provider *practice*. A similar claim was the basis for the decision reached by the US Supreme Court in *Brown v Board of Education*. This case ended the formal segregation of American public schools and was based on the argument that, even if the segregated schools available to African-American students were just as good as those available to their white contemporaries, segregation was inherently harmful. "Separate" the Court held, could not be taken to mean "equal" (*Brown v Board of Education* 1954). The decision in this case was not based on the availability, or relative quality, of segregated schools, but on "the effect of segregation itself on public education", and on the affected children (*Brown v Board of Education* 1954: 493). Alternative systems of provision of the substances of important rights, such as education in *Brown v Board of Education*, are innately harmful to the persons forced to make use of them. They humiliate and degrade affected persons by stating that it is more important to defer to the prejudices of providers, and to empower them to actively oppose the rights of their clients, than it is to respect their clients as equal members of society.

[G] ILLIBERAL INCOMPATIBILITY

In the previous section, I argued that the state's endorsement of the right to conscientiously object to the provision of contraception and abortion is innately harmful and wrongful. This is because it endorses as legitimate political discourse the belief underpinning assertions of the right, that women should not enjoy the same rights as men, thereby fundamentally rejecting their moral status as autonomous members of society. In response, it is sometimes argued that the objection to abortion and contraception is an objection to a service and not to the rights or status of the person seeking access to it, in contrast to the case of racism, homophobia and misogyny. Therefore, it is argued, conscientious refusals to dispense contraception and abortion do not discriminate against women in the way that expressions of racist or homophobic attitudes discriminate against their targets. However, as I discuss in this section, this defence lacks force (Bollinger 2021; West-Oram & Nunes 2021).

Assertions of the right to conscientiously object to duties to provide abortion or contraception are typically phrased in terms of an appeal to a negative right to avoid participation in activities which the objecting provider believes to be immoral, rather than a demand to have the positive freedom to discriminate against clients. Thus, Brock's moderate response

to the challenge of conscientious objection in medicine is argued to be a *compromise*, rather than a *concession*. It is premised on the understanding that when people assert the right to conscientious objection they are not harming their patients (if they adhere to the conventional compromise), but are merely not helping them. It may therefore be argued that the objector's personal opposition to abortion is compatible with a commitment to the rights of women to access abortion and contraception (and therefore their status as full and equal members of society) *as long as the objector herself does not have to directly provide them*. However, while this position is open to private citizens who are personally opposed to abortion, it is not possible for health care providers to object to duties to participate in the provision of contested reproductive health services, and yet to faithfully recognize the rights of women to use such services, due to their professional and/or legal roles as "gatekeepers" of those services (Alta Charo 2005: 2473; Wynn & Ors 2007: 254; West-Oram & Nunes 2021: 226-227). That is, it is coherent for a private citizen to oppose abortion and contraception morally, yet simultaneously maintain that they should be legal and accessible. This position is innately pluralist, since it asserts a moral stance which may conflict with those of other persons in their society, yet simultaneously acknowledges the rights of those other persons to hold their own beliefs and act in accordance with them (Lindemann 2009).

There are three features of health care providers which define the gatekeeper status which renders the "anti-abortion-pro-choice" position unavailable to them. First, health care providers have legal and/or professional duties to participate in the provision of health care to their clients—this is the core professional function of health care providers (Arras 1988: 15). Second, they are also the appropriate persons to whom these duties should be assigned, because of their training and expertise—physicians, nurses, and pharmacists undergo training to be able to provide appropriate care, such as abortion and contraception, effectively and safely. It is true that alternative arrangements *could* be made, and responsibility for providing contested services *could* be assigned to different agents than those to whom they are currently assigned. However, the third feature of the agents who currently hold these responsibilities weakens the argument that existing systems should be changed to accommodate objectors—they have incurred these duties voluntarily, by choosing to join the profession to which these responsibilities are rightfully assigned. These duties are not, therefore, the product of a coercive imposition of responsibility by the state. Instead, objecting providers have chosen,

freely, to undertake a career of which the performance of certain actions is a central part (Rhodes 2006; LaFollette & LaFollette 2007: 259).

Collectively, these features define the class of agents to whom the duty to guarantee access to reproductive health care services has rightfully been assigned by the state—members of this group are therefore the people to whom we do, and should, turn when in need of access to abortion or contraceptive services. This is particularly true of midwifery and obstetrics and gynaecology, specializations which are each closely connected to health issues relating to "the female reproductive system" (Royal College of Obstetricians and Gynaecologists 2026). People in these specialisms have the authority, training, and/or responsibility to provide such services, and they have become so voluntarily. Further, in the case of abortion and many forms of contraception, such as IUDs, persons outside of the gatekeeper group are prevented by law from providing these services—another reason to require fulfilment of duties to provide such services by gatekeepers (Abortion Act 1967, section 1.1). Consequently, Rita Alta Charo argues that for health care providers with this gatekeeper status to demand an "unfettered right to personal autonomy" in the provision of important health care services is an "abuse of the public trust" (Alta Charo 2005: 2473).

Notably, it was suggested in the aftermath of the *Grimmark* and *Steen* decisions (as discussed in section [B]), that abortion should or need not be considered a core professional responsibility of midwives and that conscientious objections should therefore be permitted (Brzozowski 2021: 313; Domenici 2021: 37). This argument might also be extended to other health care professions that may be involved in abortion, such as obstetricians and gynaecologists. However, this ignores the fact that, in Sweden at least, abortion simply is part of the midwife's core role, and as the European Court of Human Rights ruled, there is a legitimate interest in it remaining so. It is important for patients to be able to enjoy guaranteed access to abortion (and contraception), and Sweden has decided that midwives play a key role in achieving that goal. Both Grimmark and Steen were already working as nurses and had made a deliberate decision to seek employment as midwives, knowing that they would refuse to fulfil all aspects of that role. They did so voluntarily and could have avoided the conflict by simply recognizing that the requirements of the role were incompatible with their moral commitments and staying in their current nursing roles. While we must avoid discrimination, for the plaintiffs to expect to be permitted access to the midwifery profession while refusing to fulfil one of its core obligations is, to borrow a vivid example from Ronald A Lindsay, "analogous to allowing a Quaker to volunteer for the

military, honoring his request to command a tank division, and then leaving it to his discretion to decide, without penalty, whether the division will be deployed for combat" (Lindsay 2007: 26). The expectations in both cases, of the prospective midwives and the Quaker tank commander, are simply unreasonable and incompatible with the effective delivery of an important state aim.

Of course, given that the specific duties of *any* given professional role are the product of choices which could have been made otherwise, rather than innate, unchangeable ontological commitments, it might perhaps be tempting to conclude that the responsibilities of midwives could and perhaps should be rewritten to accommodate objectors. However, health care infrastructure is enormously complex and organized in a way to best meet the needs of patients. Restructuring the complex and interconnected organizational structures that deliver care to accommodate objectors is likely to be both extremely challenging and costly. There are medical specialities and professions that would permit objectors to avoid involvement in the provision of services to which they assert objections, so it is unclear why we should incur the costs of restructuring to accommodate their ideological commitments. Doing so is likely to be highly costly and may generate new sources of potential conscientious objections—if we must restructure reproductive health care to accommodate the demands of people with one particular set of objections, we expose ourselves to the demand that we do so for other types of objection, potentially creating the kind of organizational anarchy discussed in section [C] that would preclude the delivery of any health care whatsoever (Zohar 2003: 126; Eyal & Gosseries 2013).

While objecting providers may argue that they are not claiming that clients do not enjoy a right to reproductive health care, this is implausible. Having voluntarily become a member of the group to which duties of provision are rightfully assigned, to conscientiously object to those duties, and to thus deny their existence *as duties*, is to define an important women's liberty right as a mere privilege, only available at the discretion of a given provider and, thus, to declare that women lack equal status as full and free members of society. It is irrelevant to say that one would also refuse to provide abortion to cis gender men and, therefore, that one does not discriminate against women because cis gender men would never need an abortion in the first place. If one refuses to provide a service that is needed by only one class of person, one is effectively discriminating against that class of person and denying them their status, even if you would hypothetically deny that service to members of another class if

they were ever to need it. It is discrimination against, and denial of the status of, the affected group with one additional step (at most).

One possible objection (for which I am grateful to an anonymous reviewer) here is that it is possible that there are health workers who would deny any contraception to anyone. Such health care workers would refuse condoms and sterilization to men, just as they would deny abortion, EHC and IUDS to women. Universal refusals of this kind, it might be argued, would not dehumanize or treat as a second class of citizen the persons refused care because *everyone* would be refused access to the means to control fertility and there would be no group who enjoyed greater control over their fertility than another. This is I think an interesting question, which deserves more attention than it is possible to give in this paper. Briefly, however, I think my argument does still apply to this case.

It is first worth noting that it does seem at least plausible that a health provider who conscientiously objected to the provision of all contraceptive and abortion care to all people regardless of *gender* may not be guilty of gender discrimination specifically. Second, and importantly, the stakes for men in this scenario are significantly less severe than they are for women. Further, for the time being at least, conscience-based refusals of service to men are far less frequent than similar denials to women, while the legislation and litigation discussed throughout this paper overwhelmingly focuses on health services typically only required by women. Finally, the burden of contraception typically falls disproportionally on women, meaning that women are more likely to experience refusals of service by health care providers, even if those providers would also refuse service to men (Kimport 2018; Lévesque & Ors 2024). Thus, while the objection raises an interesting question, it is one that is likely to apply to a minority of cases amongst the domain of conscientious objection in health care provision, and to cases for which the consequences are likely to be relatively less severe due to the fact that pregnancy happens within women's bodies, and because of the privileged social position and lower contraceptive expectations typically enjoyed by men relative to women.

However, the wrongful harm on which my argument is grounded in this paper emerges from the state's endorsement as within the realm of reasonable political discourse the principle behind the conscientious refusal. What is at stake therefore, is not the immediate impact of refusals themselves, or the (in)accessibility of treatment (both of which I stipulated away via the ECC), but rather the relative weight officially assigned to different rights claims and the unjustified prioritization of the rights of health workers over those of patients (women seeking abortion

and contraception in my original argument, people of all genders in this expansion).

Therefore, while in reality the impacts on men are significantly lesser than they are on women, the wrongful harm is analogous. The state has prioritized the right of health care workers to refuse to fulfil a voluntarily undertaken professional and legal duty over the rights of their patients to access services to which they have rights and which support their ability to control their fertility and protect themselves from harm. Thus, in those cases where refusal of service is/would be universal rather than gender-specific, women *may* not be classified as holding a secondary status to men *per se*, but they would be classified as holding a secondary status to the objecting health care provider (as would men similarly denied service). Consequently, while refusals in the universal objection case *may* not be grounded in gender discrimination, they nevertheless deny the authority of clients to control what happens to their bodies, which is inherently dehumanizing. State endorsements of the right to refuse service in such cases thus follow the same pattern as those of gender-specific refusals. In both kinds of case, the rights of objecting health workers are prioritized over their patients, the rights of whom are defined by the state's endorsement of rights to conscientious objection as being of secondary status, conditional upon health workers choosing not to exercise their own rights which have been assigned greater priority.

There is significant nuance to the noted objection, which I do not have space to fully explore here. More detailed examination could explore the relevance of the significantly wider accessibility of contraceptives such as condoms compared to abortion (many supermarkets sell the former for example), or the relative impacts of refusals of the two health services for instance. However, as argued throughout the paper, my key concern is the extent to which health providers are granted permission to refuse service on non-medical grounds to people who are entitled to access these important health goods. In this way, what matters is not the health and social impacts of refusals themselves, but rather of the endorsement by the state of the right to refuse and the principles upon which that right is grounded. Thus, the ethical significance of the two cases is closely analogous, given that, in each case, the health worker's freedom is prioritized over that of their patients.

To justifiably allow exemptions to a duty which has rightfully been assigned to a particular group, and voluntarily undertaken by members of that group, the state requires especially compelling reasons which respect other important commitments of political liberalism. Private, personal

beliefs should not qualify as such when they conflict with the provision of services which are essential to the wellbeing and fundamental autonomy rights of other people, because objecting members of the gatekeeper group could have easily avoided the contentious duties by not becoming members of that group in the first place (LaFollette & LaFollette 2007: 250; West-Oram & Buyx 2016).

[H] CONSCIENCE CREEP

The key focus of this paper has been conscientious objections by health care providers to the provision of contraception and abortion. In part, this is due to the ubiquity of objections to these health care services and the increasing frequency with which they are made. Correlatively, and of greater significance, is the impact that refusals of service, and of state endorsements of rights to do so, have on the wellbeing and status of women. Abortion and contraception have for decades been the particular focus of political campaigning against the interests of women. However, conscience is now frequently used as a political tool in an increasingly broad range of contexts, providing an increasingly broad range of entitlements for objectors, and expanding the category of persons entitled to assert rights to conscientious objection (*Burwell v Hobby Lobby Inc* 2014; West-Oram & Nunes 2021). As I argue below, this expansion also increases the number of people harmed by the endorsement and exercise of this increasingly broad right.

Multiple US states have passed legislation which grants health care providers (broadly defined) conscience-based exemptions (Neal & Fovargue 2016: 544) to otherwise applicable obligations under Federal Law (Medical Ethics Defense Act 2025; Bollinger 2021; Ronan & David 2021; West-Oram & Nunes 2021; DeMillo 2021; Hansen 2022; Graf 2023). The Trump administration has also explicitly referenced protection of freedom of conscience in an Executive Order which defined sex as an "immutable binary biological classification" (Dawson 2025) and denied the existence of transgender people (Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government 2025), effectively laying the ground work for health care discrimination against transgender people (Raifman & Galea 2018; Michelson 2025; Perry 2025). Equally, ten US states have now passed legislation which allows health care providers to conscientiously object to the provision of any health care services on the basis of the sexual orientation of their patients (Tran & Ors 2025; Movement Advancement Project 2026). This is particularly significant because this legislation does not merely allow conscientious objection to the provision of a particular service, but to the

provision of services to a particular class of persons. While I argued above that appeals to this distinction in the case of contraception and abortion were unsustainable (West-Oram & Nunes 2021: 226-227), those earlier objections were at least framed in a manner which attempted to conceal their discriminatory nature. Here, by contrast the right to discriminate is overt and has already caused significant harms to the health of affected patients (Tran & Ors 2025).

The increasingly broad range of contexts in which rights to conscientious objection are asserted expose an ever-widening range of persons to real and significant harm. In doing so, they reveal a shrinking of the boundaries of the group deemed by the state to hold equal solidaristic, moral, or political status. The conscientious objection claims discussed in this paper all rest on a belief that the patients that they affect should not have access to the same rights and/or services as other people. In some cases, this claim is hidden, framed in obscuring language, and may not be recognized even by those who assert it, as discussed in section [F]. In other cases, such as those discussed in this section, the discriminatory attitudes are explicit, written into laws intended to overtly dehumanize often already marginalized people. In each case, the rights of providers (broadly defined) to refuse to provide care are prioritized over the rights of patients to access it. As argued above, even if alternative sources of care are immediately available, state endorsement of the right to refuse, accepts as reasonable the belief that the rights, and therefore status, of patients are secondary to those of providers.

In previous work with Alena Buyx, we argued that the US Supreme Court decision in *Burwell v Hobby Lobby,* which granted private corporations rights to conscientious objection, was a worrying expansion of an already problematic concept (West-Oram & Buyx 2016). One of our central concerns was that, far from protecting people from state overreach, the understanding of the right to conscientious objection affirmed by the Court granted undue power to objectors to "dictate the terms of the social contract to their benefit" (West-Oram & Buyx 2016: 342-343). Our concern was that the precedent established in *Burwell v Hobby Lobby* was likely to set the terms of debate surrounding how we provide important health and welfare services and the ways that we ensure our obligations to one another are fulfilled. In the years since that decision, legislation and litigation has granted objectors ever-greater power to redefine the social contract still further. In doing so, an increasingly narrow range of privileged actors have been empowered with greater and greater authority and freedom to deny an ever-wider range of services to an ever-wider range of people. Consequently, the entitlements granted to objectors

do not merely represent respect for the right to freedom of conscience and protection from state overreach. Rather, they provide conscientious objectors in an increasingly wide range of circumstances with special status, enabling them to deny care to patients due to their "unreasonably broadly defined right to freedom of conscience" (West-Oram & Buyx 2016: 342-343). Appeals to the right to conscientious objection have typically and historically been framed as appeals to protection from state overreach. In recent years, the reality of conscientious objection has largely seen it used as a weapon to marginalize, dehumanize, and exclude from the group of political and solidaristic concern (West-Oram 2026: 155-156; West-Oram 2021) those deemed inferior by a small group of politically powerful persons.

[I] CONCLUSION

In this paper, I have argued that when states grant health care providers rights to conscientiously object to participation in the provision of contraception and abortion they both harm and wrong those to whom care is denied. Importantly, I argue that this wrongful harm is imposed even in contexts in which there is no impediment nor additional cost to accessing these health care services. This is because, as I argued in sections [F] and [G], in enacting policy which grants rights to conscientious objection in certain contexts, states implicitly endorse as within the sphere of reasonable discourse the objection, its costs, and the beliefs upon which the conscience claim is based. In the kinds of case which have been the main focus of this paper, those beliefs are that women and other people who can become pregnant are not and/or should not be entitled to enjoy rights to reproductive autonomy or bodily integrity—rights which are of significant moral and political significance. Consequently, state endorsement of claimed rights to conscientiously object to the provision of abortion and contraception is simultaneously endorsement as reasonable the belief that women and other people who can become pregnant should have a secondary, and significantly less free, status than men. This endorsement is what makes rights to conscientious objection to the provision of contraception and abortion incompatible with the liberal–pluralist foundations upon which they are claimed to rest and is what causes the increasingly less-than-hidden harm with which I am concerned in this paper.

As discussed in section [H], the legislative and jurisprudential focus of conscientious objection in health care has until relatively recently focused on objections to the provision of services which safeguard, respect and promote the autonomy rights of women. More recently, however, just as

the harms which are my primary focus in this paper are becoming more overt, the range of persons affected by conscientious objection legislation and jurisprudence is increasingly broad, representing an arguably deliberate restriction of the range of persons deemed by the state to hold equal moral, political and social status. This should rightly be seen as an extension of the long history of conscientious objection being used to restrict access to abortion and contraception and thereby undermine the status of women. However, where those restrictions were often couched in obscuring language which concealed the impact of conscientious objection, more recent legislation and jurisprudence has made the denial of status to certain categories of person, particularly trans people, overt. In so doing, it has highlighted the social, moral, and political stratification, and denials of equal status, imposed on affected persons by state endorsements of rights to conscientiously object to the provision of certain kinds of care to certain demographic groups. It has also provided a stark warning about the expanding scope of the relational harms caused by increasingly broad guarantees of rights to conscientious objection.

As I have argued, the mere availability of alternative systems of provision does not eliminate the harm associated with granting overly broad rights of conscientious objection. Indeed, the provision of alternative systems of service provision can actually exacerbate the harms associated with denials of service—by including within the realm of reasonable disagreement, and thus normalizing, the anti-egalitarian beliefs upon which conscience claims are grounded. Seventy-two years ago, in *Brown v Board of Education*, the US Supreme Court recognized that "separate [was not] equal" (*Brown v Board of Education* 1954: 483). Today, we forget this when we treat the establishment of alternative methods of the provision of contraception and abortion as adequate compensation for deference to discriminatory attitudes. The mere availability of an alternative source of contraception and abortion does not undo the harm done to women and other marginalized and victimized people by a state's endorsement of misogynistic social norms.

About the author

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Embodied, Affective and Relational Selves and Anorexia Nervosa (AN)

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Abstract

Within her book, *Law's Relations*, Jennifer Nedelsky argued that an optimal conception of human selves would integrate understandings of human beings as embodied, affective and relational. I assess the extent to which these aspects of human selves have been sufficiently captured within relevant laws (in particular, relevant case law) and academic literature, within the jurisdiction of England and Wales, pertaining to patients with the eating disorder anorexia nervosa (AN). I argue that, although relational factors may help to explain the decisions in some cases, decided by the Court of Protection, not to continue to forcibly treat patients with longstanding and severe eating disorders (LSEDs) against their will, such decisions, and related academic commentary, do not sufficiently take into consideration the broader social relations relevant to the aetiology of eating disorders, in addition to the embodied and affective aspects of those patients suffering with the disease, which may lead to unjustifiable decisions concerning capacity, autonomy and futility.

Keywords: embodied; affective; relational; anorexia nervosa; capacity; futility.

[A] INTRODUCTION

Jennifer Nedelsky (2012) contended that the manner in which human agents are conceived within legal and political theory is inappropriately narrow and that an optimal conception of human selves would integrate understandings of human beings as embodied, affective (relating to moods, feelings and emotions) and relational. I adopt a novel approach, within this article, by using Nedelsky's framework, supplemented with concepts

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from Alasdair MacIntyre's neo-Aristotelian philosophy, to critique the narrow conceptualizations of patients with anorexia nervosa (AN) within relevant laws (particularly relevant case law), within the jurisdiction of England and Wales, and related academic literature. I argue that narrow conceptualizations of AN patients with longstanding and severe eating disorders (LSEDs) may lead to unjustifiable assessments of capacity, autonomy and futility. I contend that a careful consideration of the embodied, affective and relational aspects of human selves, within relevant cases, may lead to more justifiable decisions. I note that the affective and embodied aspects of AN patients have been considered, to some extent, within relevant case law and related academic literature. I contend that an enhanced comprehension of the affective and embodied aspects of human selves may illuminate why eating disorders develop and persist and may lead to better treatments. I note that relational factors have also been considered, within relevant case law and associated academic commentary, and help to explain the decisions, in some cases, to cease forced treatment.

However, I argue that broader social relations have been overlooked. In this context: thinness is culturally valorized; eating disorder patients face delays and stigma in accessing services; healthcare professionals lack awareness and training; resources are insufficient and rationed; and research into, and prevention of, eating disorders is inadequate. I contend that such contextual factors are relevant for determinations as to whether continued forced treatment of some patients with LSEDs is justified. I contend that failure to sufficiently comprehend the embodied, affective and relational aspects of AN patients may result in the reification (turning complex phenomena into static things) of such patients, as they may erroneously be regarded as untreatable. Medical practice is also reified where developing treatments are overlooked and AN itself is reified when regarded as a purely metabolic condition (thereby omitting patients' subjective experiences). Nonetheless, I contend that some decisions to cease forced treatment may be justified, if continued treatment is deemed to be inappropriate or non-beneficial, where the embodied, affective and relational aspects of human selves have been appropriately considered. In making this determination, attempted treatments and potential complications are relevant considerations.

[B] EMBODIED, AFFECTIVE AND RELATIONAL SELVES

Nedelsky critiqued "the prevailing stripped-down image of the 'rational agent' of both law and political theory" as "unnecessarily and destructively narrow" (2012: 159). Nedelsky also contended that a fully human self is "embodied, affective, and relational" and that "an optimal conception of human selves would integrate all three" (ibid: 33). In advancing her arguments, Nedelsky drew on previous literature regarding such aspects of human selves, including the work of feminist scholars and the work of MacIntyre. I utilize Nedelsky's framework, supplemented with concepts from MacIntyre's work, within this article. Nedelsky's work provides the framework for constructing an alternative to the image of the rational agent within legal and political theory. I contend that concepts from MacIntyre's neo-Aristotelian philosophy provide the ontological and ethical depth for fleshing out this alternative.

In his writings pertaining to medical ethics in the 1970s and 1980s, MacIntyre lamented that the predominance of secular liberal pluralism "leaves us resourceless in the face of moral problems" (1975: 17). The limits of liberal individualistic approaches within bioethics have been noted in recent academic literature pertaining to AN (Radden 2021; Tarasenko-Struc 2026). MacIntyre (1978) identified two conditions, namely a long-term relationship and similar moral views, for medical professionals to be the friends of patients, which are often not achieved in contemporary medical practice. In relation to similar moral views, MacIntyre was critical of contemporary emotivist culture whereby morality is reduced to "personal preference" (2007: 23). MacIntyre developed his alternative neo-Aristotelian philosophy within his magnum opus *After Virtue*. This was first published in 1981 and the third edition was published in 2007.

MacIntyre (2007) outlined a social teleology within *After Virtue* in which he characterized virtues as dispositions to achieve the goods internal to practices (for example, the health of patients is an internal good of medicine); contended that narratives provide unity to the different practices that people engage in; and argued that the pursuit of the good is informed by ongoing social traditions. MacIntyre's (1999) subsequent book, *Dependent Rational Animals*, represented a biological and naturalistic turn within his work, as he emphasized the ethical relevance of human vulnerability, affliction and dependence (Ramis Barcelo 2012). MacIntyre's contentions regarding friendship (MacIntyre 1978), relational autonomy (MacIntyre 1979), embodiment (MacIntyre 1999), the narrative unity of human lives (MacIntyre 2007) and rank ordering of goods (MacIntyre 2016) inform my

analysis of the three aspects of human selves identified by Nedelsky and, in turn, inform my analysis of legal determinations of capacity, autonomy and futility. Ultimately, MacIntyre's work demonstrates that, in order to be justifiable, decisions about capacity, autonomy and futility must engage with the substantive aspects of human experience conveyed by Nedelsky's tripartite framework.

[C] ANOREXIA NERVOSA

AN is a mental illness which often commences in a sufferer's adolescence (World Health Organization (WHO) 2024). The WHO states that AN "is a disorder characterized by deliberate weight loss, induced and/or sustained by the patient" (1992: 176). Although "the disorder occurs most commonly in adolescent girls and young women", it also affects "adolescent boys and young men" (ibid: 176). An individual will be diagnosed with AN if they maintain a weight substantially below their expected body weight; self-induce weight loss by avoiding foods and engaging in behaviours, such as excessive exercise; and, are excessively preoccupied with body weight or shape (WHO 2024). AN has a high relapse rate (Khalsa & Ors 2017) and many AN patients have comorbidities (which was the case for most of the patients who were the subject of the litigation considered below), such as mood disorders, anxiety disorders and personality disorders (Bühren & Ors 2013).

Medications and psychotherapies have had limited success in treating AN (Higgins 2018). AN is an egosyntonic disorder, as individuals often value their disorder, which can hinder their motivation to recover (Waller & Ors 2007). Nonetheless, recovery is possible even for patients with LSEDs (Rigaud & Ors 2012). AN also impacts the families and friends of sufferers (Woolf 2012). MacIntyre (2009) stressed the importance of interdisciplinary research. There are two dominant paradigms in theories regarding eating disorder aetiology—the biopsychiatric approach (which emphasizes genetic factors and brain functioning) and the socio-cultural model (which focuses on cultural themes and practices)—but many scholars adopt a multidimensional approach (Smolak & Levine 2015), which I utilize within this article.

Within the jurisdiction of England and Wales, AN patients may be compulsorily hospitalized (section 2) and treated (section 3) under the Mental Health Act (MHA) 1983 and their consent is not required for treatment of their mental disorder (section 63). In *South West Hertfordshire HA v KB* (1994), it was held that nasogastric feeding is medicine and an integral part of the treatment for AN. As Beverley Clough (2016) notes,

the purpose of re-feeding a patient with AN is to keep them alive while talking therapies, such as psychotherapy, are facilitated to try to treat the underlying AN. In many cases, it may not be clear that the burdens of compulsory treatment are justifiable and clinicians may desire to include patients in decision-making to make treatments viable. Consequently, clinicians may rely on the Mental Capacity Act (MCA) 2005 which stipulates that adult patients who lack capacity must be treated in their best interests (section 1(5) (see also the Children Act 1989 section 1(1) for children).

The MCA 2005 test for capacity contains diagnostic and functional (procedural) elements. The diagnostic element is that a person's lack of capacity must be due to "an impairment of, or a disturbance in the functioning of, the mind or brain" (MCA 2005, section 2(1)). The functional element is that a person is deemed unable to make a decision for themselves if they are: unable to understand the information relevant to the decision; retain that information; use or weigh that information as part of the process of making the decision; or communicate their decision (MCA 2005, section 3(1) (a)-(d)). The compulsion of AN patients not to eat has been regarded as depriving them of the ability to weigh information as part of decision-making processes (Law Commission 1995). The United Kingdom (UK) Supreme Court clarified, in *A Local Authority v JB* (2021), that consideration of the functional test should precede consideration of the diagnostic test and that a functional inability to make a decision must be causally linked to the impairment of the mind or brain. I contend that focusing on the aspects of human selves identified by Nedelsky is crucial for ensuring that those making decisions about capacity capture the full reality of human selves with AN, rather than the narrow agent that predominates within legal and political theory which may lead to unjustifiable decisions. I assess the functional test (and reform options) further below.

The Court of Protection has decided not to permit the continued forced treatment of AN patients in several cases, within the jurisdiction of England and Wales. I provide an overview of relevant cases before analysing the decisions, utilizing Nedelsky's framework of human selves and identifying patterns in relation to determinations of futility, autonomy and capacity. I focus on written judgments to reveal how LSED patients have been characterized, but recognize that such judgments may not fully reflect the expert testimony provided or the full extent of judicial engagement with pertinent issues. I also acknowledge that judges are constrained by both the adjudicative process, as they are often reliant on the evidence provided, and the individualistic focus of the MCA 2005,

which constrains the broader focus that I advocate. In the first pertinent case (of the series of cases that I analyse), *A Local Authority v E* (2012), it was decided that force feeding was in the best interests of a 32-year-old anorexic woman. The patient in that case was deemed to lack capacity and two advance decisions they had made were overturned on a retrospective determination of incapacity. However, subsequent decisions indicate a shift towards centring the wishes and feelings, and beliefs and values, of patients (Stickler 2023).

The continuation of forced treatment was not deemed to be in the best interests of adult AN patients in the following cases, which demonstrate the greater weight being given to the wishes and feelings of patients: *NHS Trust v L* (2012); *A NHS Foundation Trust v X* (2014); *Cheshire and Wirral v Z* (2016); *Re W (Medical Treatment: Anorexia)* (2016); *Northamptonshire Healthcare NHS FT v AB* (2020); *A Mental Health Trust v ER* (2021); *A Midlands NHS Trust v RD (via her Litigation Friend, the Official Solicitor), SD, LD, A Midlands Clinical Commissioning Group* (2021); *A Mental Health NHS Trust v BG (2022); Gloucestershire Health & Care NHS Foundation Trust v FD & Ors* (2023); *In the Matter of Patricia* (2023); *North East London NHS Foundation Trust v Beatrice* (2023); and *Leeds and York Partnership NHS Foundation Trust v FF & Anor* (2025). Similarly, in *Lancashire and South Cumbria NHS Foundation Trust v Q* (2022) forced treatment was not deemed to be in the best interests of a 50-year old woman suffering with bulimia nervosa (BN). In the *Patricia* case, the 2023 orders were subsequently lifted in 2025 (see *Patricia's Father and Ors v Patricia & Ors* 2025) to enable Patricia to be treated at a specialist eating disorder unit.

By contrast, in *St George's University Hospitals Foundation Trust & Anor v LV (Rev1)* (2025), it was deemed to be in the best interests of a 20-year-old woman to be fed under sedation in an intensive care unit. In two cases involving 17-year-old children with AN, namely *London Borough of Southwark v NP & Ors* (2019) and *Pennine Care NHS Foundation Trust v Mrs T* (2022), continued treatment was deemed to be in their best interests. In *Barnet, Enfield and Haringey Mental Health v CC & Ors* (2024) it was determined that esketamine may be approved as a treatment, if the 21-year-old AN patient's health improved. The drug was subsequently approved within an unpublished judgment (Cave & Tan 2025).

In his second judgment in the *Beatrice* case, Mostyn J set out five factors for consideration in determining whether compulsory treatment would continue (2023: paragraphs 2-9). The first factor is the presumption in favour of the prolongation of life (derived from Article 2 of the European Convention on Human Rights 1950). The second factor is the wishes

and feelings of the patient (as per the MCA 2005 section 4(6)). The third factor is the view of members of the patient's family. The MCA 2005 (section 4(7)(a)) states that:

> the decision maker must take into account, if it is practicable and appropriate to consult them, the views of anyone engaged in caring for the person or interested in her welfare.

The fourth factor is the overall prognosis of the patient. The fifth factor is the views of treating clinicians regarding the best interests of the patient. The third and fifth factors enable those in personal and professional relationships with patients to contribute to determining their best interests. I have outlined the relevant cases and the pertinent factors considered within them. I assess the extent to which the decisions within those cases capture the embodied, affective and relational dimensions of AN patient's selves in the following section.

[D] EMBODIED, AFFECTIVE AND RELATIONAL SELVES IN AN PATIENT CASES

With regards to the affective aspects of human selves, judges articulated the distressing aspects of the aforementioned cases. For example, Lieven J described the *ER* case as a "sad case", as it involved a 49-year-old woman who had suffered with AN since she was a teenager (2021: paragraph 3). Similarly, in the *Patricia* case, which involved a 24-year-old woman who had suffered with AN for many years, Moor J, in his second judgment, stated that "this is one of the most tragic and sad cases that I have had to deal with on the High Court Bench" (2023: paragraph 1). The distressing aspects of such cases are best comprehended if one recognizes, as MacIntyre argued, that ethics requires a consideration of man-as-he-happens-to-be and "man-as-he-could-be-if-he-realized-his-telos" (2007: 65). According to Aristotle (2009), the telos of beings (including human beings) is to achieve flourishing. MacIntyre argued that the standard for determining whether something is good or bad for humans is not personal preference (as emotivists contend) but whether it will "contribute to or frustrate our human flourishing" (2016: 25). The cases concerned patients as they happened to be, individuals suffering from AN, who could have led flourishing lives, for example, by developing relationships (considered further below) and pursuing other goals (for example, pertaining to education and careers) if they had not suffered with AN. MacIntyre contended that a person's identity is formed by a narrative about their life and that, in progressing toward their final end, people become increasingly self-aware and "better able to understand

what in their past has gone well and what has gone badly" (ibid: 54). Nevertheless, MacIntyre noted that "we are never more (and sometimes less) than the co-authors of our own narratives" (2007: 247-248). It has been argued that narratives that there is no hope for some AN patients neglect their particularities, may reify them as untreatable and may be problematically incorporated into their self-conceptions (Downs 2024a).

The difficulties that some AN patients had in dealing with emotions was considered within some of the judgments. For example, in the *X* case, Cobb J noted that Dr Tyrone Glover (who provided an independent opinion in that case and in many other cases) had opined that "starvation numbs her [the patient's] emotions, and re-feeding arouses them" (2014: paragraph 19). The emotional impact of compulsory treatment is also relevant. It has been noted that negative emotions, such as anger, confusion, distress, fear, resentment and defensiveness are common (Touyz & Ors 2024). The impact of forced treatment on the patient's emotions was considered within some of the cases. For example, in the *Z* case, Hayden J noted that one medical professional opined that "Z at least fares better emotionally when she is not subjected to an enforced medical regime" (2014: paragraph 11). The powerful affective components of AN have also been mentioned within some relevant academic literature. For example, it has been noted that such affective components impact not only agency but also beliefs (Hope & Ors 2013).

It has been queried whether ethics has kept pace with insights into AN within neuroscience (Charland 2013; Geppert 2015). MacIntyre (2016) averred that we should consider neuroscientific insights into interference with the normal functioning of the brain and the resultant impact on desires and emotions. I contend that relevant neuroscientific literature concerning emotional dysregulation, which is relevant for determinations of capacity, could have been explored more thoroughly within relevant judgments and associated academic commentary. There is a growing body of evidence suggesting abnormalities in emotional processing in those with AN (Madden 2015). A meta-analysis indicates significantly altered performance in relation to the Iowa Gambling Task (which measures risk-taking) for those with eating disorders, which is indicative of impaired decision making (Guillame & Ors 2015).

It has been suggested that AN arises due to a lost emotional self (Oldershaw & Ors 2019). Annemarie van Elburg and colleagues (2021) contend that eating disorder-related behaviours are used as coping strategies to reduce, distract from, or even numb emotional experiences. They note that the relationship between maladaptive decision-making,

disturbed emotion processing and mental capacity have not been thoroughly studied within clinical research (van Elburg & Ors 2021). An important component in treatment may be to improve hampered emotional functioning, which is a feature central to some recently developed treatments (Elzakkers & Ors 2017). The relationship between emotion processing and mental capacity is a vital consideration for judges assessing the capacity of AN patients and whether attempted treatments have sought to improve emotion processing is a relevant issue for determining whether continued treatment may be inappropriate or non-beneficial.

In relation to the second aspect of human selves identified by Nedelsky, the embodied aspect, MacIntyre was critical of theories which are "forgetful of our bodies" (1999: 5). O Carter Snead (2020) argues that this theoretical problem pervades contemporary bioethics within the United States, in which the principle of autonomy is valorized. I contend that the embodied aspect of human selves is important in comprehending the impact of LSEDs on sufferers and the intractable nature of eating disorders. This aspect of human selves was briefly considered within the aforementioned cases. For example, the debilitating effects of AN were mentioned within some judgments (see, for example, *E* 2012: paragraph 23; *AB* 2020: paragraph 1). In his first judgment in the *Beatrice* case, Mostyn J compared the calorific intake of the patient with the calorific intakes of volunteers in the Minnesota Starvation Experiment (MSE) (2023: paragraphs 13-14). It is unfortunate that this was only considered in passing, as it, along with other relevant scientific literature, provides insights into the intractable nature of AN.

The MSE was a 12-month clinical study which took place between 1944 and 1945 and involved 36 American male volunteers, who were conscientious objectors to military service during the Second World War, agreeing to cut in half their daily intake of food (for the six-month semi-starvation period of the study) (Keys & Ors 1950a; 1950b). The experiment revealed the morphological, biochemical, physiological and psychological impacts of starvation. The degree of normality of subject participants was assessed using the Minnesota Multiphasic Personality Inventory (McKinley & Hathaway 1944; Keys & Ors 1950b). In the control period of the experiment, average standard scores for nearly all clinical scales were close to normal averages (Keys & Ors 1950b). However, the experiment revealed that food restrictions resulted in changes in the personality of participants, preoccupation with food and emotional instability (ibid). This corresponds with the analyses mentioned above in my discussion of the affective aspect of human selves.

The MSE study had some limitations, such as differences in the characteristics (such as age and sex) of the participants and the majority of AN sufferers (Sarro 2018). Nonetheless, the insights that the study provides are also evident in more contemporary psychological literature, in which two related models, the habit model and the reward model, have been devised to explain the intractable nature of AN (Walsh 2013; O'Hara & Ors 2015; Evans 2023). The developers of the treatment, Temperament Based Therapy with Support (TBT-S), contend that temperament, "the biological basis of our personality, influenced by genetics, brain circuit development and function over one's life span", may make individuals vulnerable to developing psychological disorders (Hill & Ors 2022: 4). They also contend that their explicit focus on the biological basis of AN has been beneficial for patients, as it "removes unnecessary guilt that their illness is their choice" (ibid: 27). Sociological studies also highlight how the forging of dispositions influences the development of, and recovery from, AN (Darmon 2016). If the embodied aspect of human selves and the insights that can be derived from relevant studies into this aspect (which highlight that it is difficult, but not impossible, for patients to recover from AN) are overlooked, patients with LSEDs may be problematically reified by being regarded as untreatable. The aforementioned scientific, neuroscientific and psychological literature highlights the profound impact of physiological and psychological states on human agency, but I do not endorse a reductive biomedical model. Rather, I argue that such insights must be combined with insights from other disciplines and that AN should not be reified as a fixed biological entity detached from the lived experience of patients.

The third aspect of human selves, identified by Nedelsky, is the relational aspect. Although it has been argued that a relational turn has taken place within academia, some contend that uses of associated concepts, such as relational autonomy, have tended to emulate traditional accounts of autonomy in starting at the point of separated isolated individuals (Bridgeman 2022). This criticism is not applicable to MacIntyre's revisionary conceptualization of autonomy (O'Shea 2012). MacIntyre (1979) contended that autonomy and rationality are social achievements and stated that serious illness may remove individuals "from the network of role relationships and activities which constitute their lives" (ibid: 94). He described serious illness as one of a series of conditions:

> in which people are removed from the network of role relationships and activities which constitute their lives so that they actually become, to some extent, an impoverished shadow of their true everyday self (ibid).

This was evident in accounts of the relationships of AN patients in the aforementioned judgments. For example, in the *E* case, Jackson J noted that "a significant feature of E's personality disorder is associated with difficulties in forming and maintaining relationships" (2012: paragraph 27).

As mentioned above, judges must consider relational factors in adjudicating such cases, including the views of family, friends and treating clinicians. Jennifer Radden contends that the relational model of persons may justify involuntary treatment, as the AN patient's interests and perspectives would no longer be exclusively privileged but would be "recognized as only one among the others comprising her identity" (2021: 148). Similarly, in his consideration of the life of Father Denis Faul (a Northern Irish Roman Catholic priest), MacIntyre noted that, in order to save lives during the 1981 Irish republican hunger strike, Faul controversially persuaded some families of dying hunger strikers to intervene so that they "were fed and brought back to life against their will", ending the strike (2016: 305). MacIntyre noted that Faul believed that several different goods had to be considered and that the good of the families should not be sacrificed to the republican cause (which was the overriding good pursued by the strikers). However, this reasoning could potentially justify other controversial treatment decisions. For example, such reasoning implies that a young former Roman Catholic could have their decision to have an abortion overridden by devout Catholic family members (Tarasenko-Struc 2026).

In many of the aforementioned cases, the patient's relatives were supportive of their wishes for treatment to cease. In contrast, in the *Beatrice* case (as noted in the second judgment, 2023: paragraph 19), the patient's father and brothers wanted her "to have whatever treatment is necessary to preserve her life, including compulsory treatment". This case indicates that relational factors are not always decisive, as the ultimate decision did not accord with the relative's wishes. The strength of views of family and friends was considered within such cases. For example, in the *E* case, Jackson J's decision for treatment to continue was influenced by the fact that those who knew E were sceptical but "not in outright opposition to treatment taking place" (2012: paragraph 139). In many of the cases, there was a consensus among medical professionals to cease forced treatment, although there were disagreements between medical professionals within some cases (such as the *E* case). The impact of compulsory treatment on the relationship between patients and medical professionals is also a relevant consideration. Clough contended that the outcome in each case that she analysed "was also the outcome which

the expert opinion tended to favour" (2016: 444). However, it has been argued that judges have exhibited greater willingness to question expert views in more recent cases (Cave & Tan 2025).

Although the views of family members, friends and medical professionals were considered within the cases, broader contextual factors, which are also relevant to the relational aspects of human selves, were often neglected or dismissed. Clough notes that, as judges cannot demand that particular services are provided, their analysis is necessarily constrained to a narrow focus on individuals "rather than broader institutional practices and behaviours" (2021: 101). In the *RD* case, Moor J alluded to a criticism of the historical treatment of the patient involved. Moor J noted that a consultant psychiatrist was critical that the patient "had been treated in the community for too long when in her 20s without admission to an" eating disorder unit (2021: paragraph 6). However, although Moor J mentioned this criticism, they did not delve into its merits. I argue that such broader contextual factors are pertinent considerations for judges adjudicating relevant cases.

Social relations

I contend that, in order to avoid reifying patients with AN as untreatable, broader social relations must be considered within relevant cases. There are aspects of the prevalence, diagnosis and treatment of the disease which should be addressed and which could prevent some patients reaching the stage of the AN patients in the aforementioned cases. The prevalence of eating disorders, among children and young people in England, has increased in recent years (NHS Digital 2023). The clandestine nature of such illnesses may mean that completely accurate data is elusive (Woolf 2012). There is a need for further research into eating disorders. The All-Party Parliamentary Group on Eating Disorders (APPGED) (2021) determined that just 1 per cent of mental health research funding went towards research on eating disorders, between 2015 and 2019, despite eating disorders accounting for around 9 per cent of UK mental health conditions. In addition, there have been no coordinated efforts at eating disorder prevention and early intervention (Hemmings & Ors 2023).

The lack of access to services for eating disorder patients may mean that "people may grow into illness, rather than out of it" (Downs 2024b). Those patients who are able to access services often face stigma from medical professionals (Johns & Ors 2019; Health and Social Care Committee 2022). The Health and Social Care Committee therefore concluded that there was a need for "further awareness and training among all healthcare

staff" (2022: 4). The Parliamentary and Health Service Ombudsman (2017) report into the death of a 19-year-old woman, Averil Hart, from AN, in 2012, reached similar conclusions. The report also criticized the lack of parity between adult eating disorder services and child and adolescent services and the lack of co-ordination between staff treating patients (ibid). In 2023, Rob Behrens (Parliamentary and Health Service Ombudsman) lamented that little progress had been made subsequently (Gregory 2023). The National Audit Office (2023) identified staff shortages as a major constraint in improving and expanding mental health services within England. More funding for the treatment of, and research into, AN and more training for healthcare workers could help to alleviate suffering.

If AN patients, who are the subjects of proceedings, are reified as untreatable, it may have a detrimental impact on the treatment of, and conceptions of, other AN patients. In this regard, campaigners have expressed concern about the rationing of care within England, with patients having care discontinued when their illness worsens or if they are deemed to be not improving quickly enough (Marsh 2023; Harris 2024). There was controversy, in 2022, when a leaked guidance document for the east of England suggested that LSED patients should be put on a palliative pathway "without the focus being on full recovery or weight gain" but attention paid instead to "physical health monitoring" and "pain and symptom management" (Dunn 2023; Harris 2024). According to responses to freedom of information requests by APPGED (2025), many individuals have been discharged with dangerously low body mass indexes on the basis that they did not want to get well. In a context where thinness is valorized culturally, those accessing or attempting to access services face stigma, there is a lack of awareness and training among healthcare professionals, there are insufficient resources and insufficient research into, and focus on the prevention of, eating disorders, regarding some AN patients as incurable is ethically problematic and may obscure various social aspects and failures pertaining to the condition. Consequently, judges should be more cautious and should thoroughly interrogate the treatment histories of patients before deeming treatment to be inappropriate or non-beneficial. In addition, through meticulous analysis, judges can highlight the broader policy and resource issues and their judgments could be a spur for needed reforms.

[E] FUTILITY

As per the second factor identified by Mostyn J in the *Beatrice* case, judges have supported the wishes of patients not to be subjected to continued forced treatment in many of the cases, on the basis that continued treatment is futile. In the *E* case, Jackson J stated that "I would not overrule her [the patient's] wishes if further treatment was futile, but it is not." (2012: paragraph 138) In contrast, in the *L* case, King J described force feeding under sedation as "futile, carrying with it a near certainty that it would cause her death in any event" (2012: paragraph 68). In the *RD* case, Moor J stated that compulsory treatment "will achieve nothing and be futile" (2021: paragraph 40). Similarly, in the *AB* case, Roberts J stated that "to embark on that course [forcible tube feeding or tube feeding under sedation] now is likely to be futile and may well precipitate her death in any event" (2020: paragraph 66).

The use of the concept of futility, to justify denying or withdrawing life-sustaining treatment, has been critiqued within previous academic literature (Auckland 2021). My above analysis indicates that describing the continued treatment of LSED patients as futile may obscure problematic aspects of social relations, such as shortcomings concerning the prevention and treatment of AN. A further issue concerns how futility is defined. Cynthia Geppert (2015) notes that there are three broad definitions of futility within medical literature: physiological (interventions which are considered inappropriate as they have 0 per cent chance of succeeding); quantitative (interventions which have not worked in a certain number of cases); and, qualitative (interventions which are not supported as the burdens outweigh the benefits or, given the patient's poor prognosis, cannot provide a minimum quality of life worth living). Geppert avers that none of these definitions has the "necessary grounding in medical science or ethical reasoning" (ibid: 42) to be applied to patients with LSEDs. Scott Crow (2023) contends that the most critical gap in using terms such as futility (and related terms) in relation to LSED patients is the current lack of ability to rigorously predict outcomes. There is also a concern that perceptions of futility may reflect the burnout of treatment teams rather than unlikelihood of success (Cave & Tan 2017).

Another issue is the diverse array of labels in use for LSEDs, such as severe and enduring AN (SE-AN), severe and enduring eating disorder (SEED) and terminal AN (Gaudiani & Ors 2022; Birch & Ors 2024; Elwyn & Ors 2024). The terms SE-AN (*RD* 2021: paragraph 6) and SEED (*AB* 2021: paragraph 1) have been used within relevant cases and the word "terminal" was used in King J's declaration in the *L* case. With regards to

SE-AN and SEED, Alykhan Asaria (2025) notes that enduringness and severity are not necessarily correlated. With regards to terminal AN, Anneli Jefferson (2024) contends that the proposed diagnosis problematically reifies AN as a metabolic condition.

The usefulness of the various labels used to describe LSEDs are called into question by one study which indicated that patients with LSEDs did just as well in enhanced cognitive behaviour therapy (CBT-E) as any other patient starting treatment (Raykos & Ors 2018). It has been suggested that more apt terminology than futility, in cases involving some LSED patients, may be that treatment is "potentially inappropriate" or "non-beneficial" (Geppert & Ors 2021). In assessing whether treatment is potentially inappropriate or non-beneficial, possible complications, such as refeeding syndrome (shifts in fluids and electrolytes which can be fatal) and the potential co-operation and resistance of patients, are relevant considerations, which were considered within some of the cases that I have analysed.

It has been argued that virtues, such as compassion, humility and prudence, may justify not continuing treatment in some cases (McKinney 2015; Westermaira & Ors 2021). Consequently, harm reduction and palliative care have been suggested as appropriate for some patients (Lopez & Ors 2010). Nevertheless, hope is also regarded as a virtue, and sufferers have indicated that hopeful messages are often unjustifiably absent from their interactions with healthcare professionals (Downs 2024b). A paradox of demedicalization has been identified whereby the likelihood of patients receiving robust medical care diminishes as their illnesses become more medically compromising and life-limiting (Downs & Adams 2025).

Another relevant consideration, in determining whether treatment is likely to be potentially inappropriate or non-beneficial, is the previous treatments that patients have undergone. Comprehensive details regarding the psychiatric treatments that the patients involved in the aforementioned cases underwent is not provided within all of the judgments. Such information is relevant to assessing whether treatment options have been exhausted. A related issue is that:

> people with longstanding AN may not actually be "treatment resistant," but rather the treatments delivered to them may not have been adequately tailored to meet their needs (Hay & Ors 2021).

The concept of SE-AN may "be the result of cross-feedback between misleading assumptions and the increasing iatrogenic effects of failed

treatments" (Gutiérrez & Carrera 2021: 2; Olmsted 2020). Similarly, James Downs and colleagues aver that:

> the poor prognosis seen in eating disorders is not a product of the inherent characteristics of the disorders—that eating disorders, and those who experience them, are untreatable (2023: 146).

Whether the treatments were adequately tailored to meet the needs of the patients within the aforementioned cases does not appear to have been sufficiently explored within relevant judgments and academic commentary.

The potential for newer treatments to help patients is also a relevant consideration. John Coggon (2014) notes that, in the *E* case, Jackson J opined that the patient did not have to receive every possible treatment to see if it succeeds (2012: paragraph 134). However, if treatments have not been tried, which could have been, this renders determinations of futility questionable. As Phillip Mehler and colleagues note, "treatments are constantly evolving, and no patients have yet failed all of the possible combinations of potentially successful treatments" (2021: xix). In the view of Glover (2024), "no stone is left unturned and no possible or future treatment is beyond consideration" in relevant cases. However, whether emerging treatments could have helped the patients in the aforementioned cases does not appear to have been sufficiently explored within all of the relevant judgments. Nonetheless, newer treatments were explored in some cases, such as the use of esketamine within the *CC* case. If emerging treatments are not sufficiently explored, patients and medicine may both be reified due to assumptions that the former cannot recover and that the latter is static. The APPGED has recommended that judges and lawyers receive training regarding eating disorders as they "are marking individuals as untreatable and allowing NHS trusts to withdraw care when the individual has not necessarily been offered a variety of treatment" (2025: 25).

[F] CAPACITY

As mentioned above, the MCA 2005 test for capacity contains diagnostic and functional elements, and AN patients have been deemed to lack capacity, within relevant case law, as their compulsions have been regarded as rendering them unable to weigh information as part of decision-making processes regarding medical treatment. Daniel Wang (2015) contends that the manner in which the MCA 2005 has been applied, in practice, in relation to AN patients, is incompatible with the Convention on the Rights of Persons with Disabilities 2007 (CRPD)

(specifically Article 12, equal recognition before the law), as AN patients have been deemed to lack capacity based on diagnosis only.[1] However, the judges within relevant cases have not ruled out that some AN patients may have capacity. In the aforementioned *Q* case, involving a patient with BN, Hayden J determined that the presumption of capacity had not been rebutted in relation to a treatment decision for *hypokalemia* (low levels of potassium) (2022: paragraph 55).

Jefferson (2024) contends that several factors (such as the fact that the fear of gaining weight restricts what seems possible to AN sufferers, whether decisions reflect a patient's values or compulsions and the potential for reifying AN as an entity) demonstrate that establishing decision-making capacity may be extremely difficult. Many scholars argue that some AN patients may be competent or rational to refuse continued treatment in particular cases, for example, where treatment has been unsuccessful for a long period (Draper 2000; Giordano 2005; Pugh 2020). Although such refusals may reflect such patient's wishes and feelings, describing such decisions as autonomous may obscure the affective, embodied and relational (in particular, broader social relations) aspects which have influenced their current circumstances.

Paul Skowron (2019) notes that the relationship between autonomy and capacity is represented in three co-existing and contradictory ways by judges within the jurisdiction of England and Wales: capacity being the gatekeeper of autonomy (the gatekeeper account, which informed the MCA 2005); capacity being necessary but not sufficient for autonomy (insufficiency account); and autonomy sometimes surviving the absence of capacity (survival account). Skowron (2019) notes that the decision in *E* exemplifies the gatekeeper account, as feeding the patient involved against her will was deemed to be justifiable, as she lacked capacity, despite the fact that it was deemed to be "a very severe interference with her private life and personal autonomy" (2012: paragraph 125). However, the judge's comments in their decisions in *X* (2014: paragraph 46), *Z* (2016: paragraph 19), *AB* (2020: paragraph 67), *BG* (2022: paragraph 38), *Patricia* (in Moor J's first judgment, 2023: paragraph 22) and *FF* (2025: paragraph 65) are indicative of the survival account. For example, Moor J stated in the *Patricia* case that, although the patient concerned did not have capacity, he was:

> still of the view that she should have her autonomy on the basis that it is not in her interests to force-feed her against her wishes,

[1] I confine my analysis of the CRPD to academic critiques of judicial consideration of capacity. I note that the CRPD could also potentially be drawn on to develop a broader rights-based argument about states not fulfilling their obligations in relation to resource allocation.

> as it would be futile and cause her nothing but distress and turmoil (2023: paragraph 22).

Several reform options to the functional test have been suggested. As capacity tests are arguably too focused on cognitive and rational functioning, thereby overlooking the emotional dysregulation analysed above, some scholars have recommended additions (such as determining whether the patient's values are pathological) within relevant tests (Tan & Ors 2006). However, as Alex James Miller Tate (2020) notes, it may be difficult to distinguish pathological from non-pathological values and it may be tautological to use diagnostic criteria in defining the latter. Miller Tate has queried whether scholars "are asking the concept of capacity to bear too much moral weight" due to "horror and dismay" regarding the decisions that AN patients may make (ibid: 27). Miller Tate (2020) states that a different justification for treating such patients against their will may be required. As mentioned above, individuals can be treated compulsorily for their mental disorder under the MHA 1983, section 63, even if they have capacity. The MHA 1983 is justified on the basis that it prevents people with mental disorders from doing something that they would not do if they were well (Wessely 2018). There is evidence of recovered AN patients retrospectively acknowledging the necessity of forced treatment, although future regret is understudied (Tiller & Ors 1993; Watson & Ors 2000; Pugh 2020).

Some scholars contend that a weak substantivist approach to autonomy, whereby an agent's self-regarding attitudes provide standards by which their treatment decisions can be assessed, is preferable to an inconsistently applied value neutral approach (Condo 2022; Freyenhagen & O'Shea 2013). Those advocating a weak substantivist approach share, with those who favour proceduralist approaches, a concern that discussing the human good in shared objective terms opens the door to the imposition of values on individuals by others (Haliburton 2015). However, without substantive ethical discussions, people have nothing to base their conceptions of the good on than their own beliefs and desires, which may be manipulated (ibid).

Although it has been argued that the functional test is manipulated to deem that some AN patients lack capacity, as Sam Boyle (2019) notes, it may indicate incapacity (without manipulation) in some cases. For example, if an AN patient espouses false beliefs about the quality of available food; is unable to apply information about nutrition to themselves; and/or, demonstrates discordance between their goals and decisions (ibid). In relation to the latter, many LSED patients state that they want to live, but their refusal of treatment contradicts this goal. This may be comprehended

by applying G E Moore's paradox, as the assertions of such patients, that they want to live but do not want treatment as they view themselves as fat, reflects a conflict between secondary-process-mediated-beliefs (the objective recognition of medical danger) and primary-process-mediated-phantasy (the internal seeming of being fat) (Moore 1993; Fileva & Brakel 2019). In contrast, Radden (2021) contends that such statements may exemplify a patient's subjective value ranking, with some goals (such as self-control and weightlessness) being prioritized over others. Jonathan Pugh (2020) also notes that one option (although not his preference) for rationalists, is to argue that it is illogical to prefer certain goods (such as low weight) over others (such as survival) and therefore that treatment refusals by AN patients could be described as irrational.

MacIntyre's (2016) neo-Aristotelian position is that rational agents have a higher order desire not to prefer the lesser to the greater good in particular situations. MacIntyre contended that the development of character involves learning to "distinguish those of our desires that are desires for genuine goods [those that will contribute to our flourishing] from those that are not" (2011: 11). The development of character, and ordering of desires, includes moral, psychological and affective aspects (Hernandez Gonzalez 2022). MacIntyre averred that "we become intelligible to others just insofar as" others "can identify and understand as possible goods the goods that furnish us with reasons for desiring as we do and acting as we do" (2016: 9). The desire of AN patients for low weight over flourishing will generally be unintelligible to others, who will endeavour to help such patients to desire in accordance with their flourishing (Kious 2015). Nevertheless, subject to the proviso of the insights derived from my above analysis of futility, the desire of AN patients for treatment to cease (whether or not they have capacity) may be intelligible where continued treatment may be properly regarded as potentially inappropriate or non-beneficial. In determining this, relevant considerations include attempted treatments and potential complications.

[G] CONCLUSION

Nedelsky contended that an optimal conception of human selves would integrate understandings of human beings as embodied, affective and relational. I drew on MacIntyre's philosophy to thoroughly assess the extent to which these aspects have been sufficiently captured within relevant laws (in particular, relevant case law), within the jurisdiction of England and Wales, and academic literature, pertaining to AN. I argued that relational factors have been important considerations in some cases to not continue to forcibly treat patients with LSEDs. However, I averred

that such decisions, and related academic commentary, problematically neglect the broader social relations relevant to the aetiology of eating disorders. I also contended that the embodied and affective aspects of human selves have been neglected in pertinent cases and associated academic commentary. I argued that neglecting such aspects of human selves may lead to unjustifiable decisions regarding futility, capacity and autonomy. I contended that patients may be reified by being regarded as untreatable, that medicine may be reified if newer treatments are overlooked and that AN itself may be reified if it is regarded as a purely metabolic condition.

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Care without Status: Intended Mothers in the ECtHR's Surrogacy Jurisprudence

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Abstract

This article examines the surrogacy jurisprudence of the European Court of Human Rights regarding intended motherhood through a feminist anti-stereotyping lens. It argues that gestation and birth remain the normative basis of legal motherhood, while non-gestational maternal claims lack equivalent constitutive force. It further considers the limited force of reproductive intention and intended mothers' subjection to both regulatory and normative scrutiny. The article's main contribution lies in showing how apparently neutral legal reasoning concerning recognition may reproduce gendered hierarchies. Finally, it introduces "care without status" and develops "derivative motherhood" to explain, respectively, the gap between maternal practice and legal status and the mediated structure through which intended motherhood becomes legally recognized.

Keywords: surrogacy; intended mother; ECtHR; stereotypes; derivative motherhood.

[A] INTRODUCTION

Surrogacy is a valuable method of family formation, whereby a woman (surrogate)[1] gestates and gives birth to a child on behalf of someone else, the intended parents (IPs) (Horsey & Ors 2025: 1). Restrictive regulation in many European states drives their citizens abroad to seek international surrogacy (Storrow 2018). This creates complex legal and immigration hurdles for IPs, ranging from travel restrictions and child separation risks to the common refusal of home countries to recognize foreign legal parenthood (Iliadou 2025a: 342). The families involved have increasingly turned to the European Court of Human Rights (ECtHR) to address whether denying the recognition of this parent–child relationship

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[1] Trans men or non-binary people can also be surrogates, but the term "woman" is used here to mirror the terminology of the ECtHR jurisprudence and domestic laws on legal parenthood discussed in this article.

violates the right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR).

A substantial body of scholarship has examined the ECtHR case law on cross-border surrogacy in relation to the recognition of legal parenthood (Tryfonidou 2024; Iliadou 2025a), children's rights to identity and the application of the best interests principle (Bracken 2017; Mulligan 2018), the significance of genetic connection (Tesfaye 2022) and the scope of states' discretion concerning the means and timing of recognition (Bracken 2024; Iliadou 2025b). Scholarship has also exposed the gendered consequences of the Court's approach, including the different significance attributed to genetics and gestation for intended fathers and mothers and the mediated character of intended mothers' claims to recognition (Margaria 2020; Levy 2022; Margaria 2024b).[2] This article builds upon these insights by examining the ECtHR's construction of intended motherhood through the lens of gender stereotyping.[3] It asks what assumptions about authentic and legitimate motherhood are embedded in the Court's surrogacy jurisprudence and how those assumptions shape the recognition of intended mothers under Article 8.

The article argues that the Court's approach is anchored in the normative assumption, which is deeply informed by gender stereotypes about maternal identity, that equates gestation and birth with authentic, legally cognizable motherhood, which in turn produces a recurring disjunction between maternal practice and maternal legal status. Caregiving and established mother–child relationships may be acknowledged, while the intended mother's legal status remains contingent on genetic connection, the child's interests, the genetic father's position and domestic routes to recognition. By introducing the concept of "care without status" to capture this pattern, the article demonstrates how apparently neutral reasoning concerning parenthood and Article 8 may reflect and reproduce gendered assumptions about authentic motherhood, while making the intended mother's legal identity conditional upon the rights, status and

[2] This article deliberately focuses on intended mothers who identify as women in order to examine the distinct gender scripts and essentialist assumptions attached to female reproduction and maternal identity. Using the term "mother" to describe an intended mother prior to legal recognition acknowledges her reproductive agency and caregiving role, underscoring the very gap between social reality and legal status explored in this article.

[3] This article forms part of a broader examination of gender stereotyping in the ECtHR's surrogacy jurisprudence. A related forthcoming chapter applies feminist critical discourse analysis to the Court's construction of surrogates, identifying biological essentialism and the "natural" mother, vulnerability and passivity, and the apparent neutrality through which such stereotypes remain unchallenged: see Iliadou (forthcoming).

cooperation of others, thereby foregrounding the mediated character of intended motherhood.

The concept of "derivative motherhood", developed later in the article, is situated within broader debates concerning derivative parenthood (Black 2014; Strauss 2025) and builds on Alice Margaria's observation that the 2019 *Advisory Opinion* (P16-2018-001) constructs motherhood as "a derivative of fatherhood" (Margaria 2020: 424). As used here, the term does not denote moral, social or *de facto* inferiority. Instead, it captures the conditional legal validation of an intended maternal relationship whose practical existence does not itself determine legal status.

The article's original contribution lies in bringing a feminist anti-stereotyping lens to the ECtHR's treatment of intended mothers. It uses this lens as an interpretive method to identify underlying assumptions about women and motherhood, including how particular understandings of motherhood are rendered natural or self-evident, and to consider whether apparently neutral legal reasoning concerning recognition may also operate as a site of normative scrutiny. Building on scholarship that has identified the gendered asymmetry between intended mothers and fathers and the mediated character of intended motherhood, the article shifts attention to the stereotyping processes through which those outcomes are produced and sustained. This approach enables the article to examine how the gestational construction of motherhood structures the legal treatment of non-gestational maternal claims. In doing so, it develops "care without status" to conceptualize the disjunction between maternal practice and legal recognition, while "derivative motherhood" captures the structure through which that recognition is secured.

The article is structured as follows. First, it briefly establishes the framework developed by the ECtHR for recognizing intended mothers as the legal mothers of their surrogate-born children. It then explores how gender stereotypes concerning motherhood operate through and sustain this framework. Finally, it conceptually synthesizes these findings by characterizing the resulting form of recognition as "derivative motherhood" and the accompanying disjunction between maternal practice and legal status as "care without status". Overall, it argues that the treatment of intended mothers cannot be solely understood as a problem of parenthood recognition but must also be understood as a gendered process through which some forms of motherhood become legally self-evident while others remain conditional upon external validation.

[B] THE ECtHR FRAMEWORK FOR RECOGNIZING INTENDED MOTHERS

The ECtHR has not recognized a standalone right of an intended mother to legal parenthood over a surrogate-born child. Rather, the framework for recognition has emerged incrementally from the child's Article 8 right to respect for private life, initially through cases concerning genetic intended fathers and subsequently extended to intended mothers. The resulting framework distinguishes between the state's obligation to ensure legal recognition of parenthood and the means by which it may be secured, while attaching particular importance to genetic connection, the child's best interests and the particular familial configuration of the family concerned. This section briefly reconstructs that framework to the extent that it is relevant to the position of intended mothers.

The starting point for the recognition of a parent–child relationship following a surrogacy arrangement is *Mennesson v France* (2014), where the Court considered France's refusal to recognize the legal parenthood established in the United States of America. Although the Court found no violation of the IPs' rights, it held that legal parenthood formed part of the children's identity and, because Mr Mennesson was also their genetic father, the impossibility of having that relationship recognized under French law exceeded the state's margin of appreciation and constituted a violation of the children's private life (*Mennesson* 2014: paragraphs 96-100). The judgment established a core principle: where an intended father is genetically related to a surrogate-born child, the child's right to respect for private life requires domestic law to provide a possibility of legally recognizing that relationship (Iliadou 2025a: 345-346). It was observed that the harm concerned the children's "right to development of their personal identity", encompassing both nationality and genetic identity (Mulligan 2018: 459).

However, *Mennesson* did not resolve the position of the intended mother, who was not genetically related to the children. In its 2019 *Advisory Opinion* (P16-2018-001), the Grand Chamber extended the recognition principle to the non-genetic intended mother but under a particular configuration. It held that, where a child has a genetic link with the intended father and the intended mother is designated as the legal mother in the foreign birth certificate, the child's right to respect for private life requires domestic law to provide a mechanism for recognizing a legal parent–child relationship with the intended mother (*Advisory Opinion* P16-2018-001 2019: paragraph 46). The Court again relied on the child's right to private life rather than the intended mother's rights

(Bracken 2021: 7). This principle was subsequently extended to a non-genetic intended father in *DB and Others v Switzerland* (2022), which concerned a male same-sex couple where the other intended father was genetically related to the child. Thus, the emerging principle was broader than the particular maternal configuration considered in the Advisory Opinion, establishing that, where an intended father is genetically related to the child, Article 8 requires the possibility of recognizing the other IP even in the absence of genetic relatedness (Iliadou 2025a: 345-348).

The Court has also considered the position of an intended mother who is herself genetically related to the child. In *D v France* (2020), both IPs were genetically related to the child and the Court confirmed that the child's right to respect for private life required the possibility of recognizing the legal parent–child relationship with the genetic intended mother (paragraph 54). The Court has not yet considered a cross-border surrogacy case in which the intended mother is genetically related to the child but there is no genetic intended father, leaving unresolved whether maternal genetic relatedness alone would trigger the same obligation (Iliadou 2025a: 355-356). As the framework has developed gradually, there is no comprehensive solution to every form of parenthood arising from surrogacy (Tryfonidou 2024: 162). However, in a case involving two intended mothers who both lacked a genetic tie with the child, the Court accepted that foster-care arrangements were sufficient to preserve their family life and did not require recognition of legal parenthood (V*aldís Fjölnisdóttir and Others v Iceland* 2021: paragraphs 56-76; Bracken 2024: 154-155). Importantly, the child's private life was not examined separately, departing from the Court's previous approach and suggesting that, rather than assessing the child's best interests more holistically, the Court places principal emphasis on genetic identity, with genetic relatedness treated as especially worthy of legal recognition.

Furthermore, the ECtHR surrogacy case law reveals a double limitation for intended mothers: first, the continuing significance of genetic relatedness and, second, the possibility that legal motherhood may depend on the legal position and cooperation of the genetic intended father. The latter occurred in *AM v Norway* (2022), where, following the breakdown of their relationship, the genetic intended father, whose legal parenthood was readily recognized by the authorities, refused to consent to the child's adoption by the non-genetic intended mother. Adoption was her only pathway to legal recognition. However, the Court found no violation of the intended mother's rights, because, among other factors, it considered the requirement of a legal parent's consent to adoption to

be reasonable (*AM v Norway* 2022: paragraph 132).[4] This illustrates that legal parenthood for intended mothers is not only contingent on genetic relatedness but can also be at the mercy of the genetic intended father, even though they embarked together on this joint parental project.

Even when the Court requires legal parenthood to be recognized under the aforementioned configuration, it does not determine the means or timing through which recognition must be achieved. The Court does not prescribe a particular method of establishing legal parenthood and, while the margin of appreciation is narrow as to the need for recognition, states retain wider discretion as to its means (*C v Italy* 2023: paragraph 74). Recognition need not occur *ab initio*, and adoption may constitute an adequate mechanism, including for a genetically related intended mother, provided that legal parenthood is established "promptly and effectively" and, at the latest, when the parent–child relationship has become a "practical reality" (*Advisory Opinion* 2019: paragraphs 51-55; Iliadou 2025b: 200-202). In *D v France*, this discretion resulted in different routes to recognition for the genetically related IPs, where the father had been recognized through partial transcription of the foreign birth certificate, while the mother was required to adopt, a differential treatment acknowledged by the Court but not examined on its merits so that there was no violation (*D v France* 2020: paragraphs 59-64; Levy 2022: 149-151). Subsequent case law has clarified that Article 8 may be violated both where recognition is generally (*in abstracto*) impossible and where, despite a mechanism existing in principle, there is no real means for the particular IP to establish legal parenthood (*KK and Others v Denmark* 2022: paragraphs 70-76; Iliadou 2025a: 346). This development has also raised concerns about the creation of a two-tier adoption system, as IPs may effectively bypass ordinary domestic adoption criteria where no alternative pathway to legal recognition exists for children born through cross-border surrogacy (Bracken 2024: 152-153).

Following from the above, for the purposes of this article, four features of the framework are particularly significant. First, the legal recognition of intended motherhood has developed principally through the child's right to respect for private life rather than through a clearly articulated autonomous entitlement of the intended mother. Second, genetics remains central to determining when Strasbourg will require recognition, although the precise significance of maternal genetic relatedness remains

[4] It is worth noting that the child was not a party to the proceedings. As Margaria observes, this meant that the intended mother could not benefit from the central position accorded to the child's interests in the Court's previous surrogacy case law, while the genetic intended father had also terminated contact between the intended mother and the child (Margaria 2024b: 191-194).

unsettled. Third, even where recognition is required, states retain discretion over its means and timing, with adoption occupying a central role and recognition capable of following rather than preceding the development of the relationship in practice. Finally, the strength of the recognition obligation varies according to the legal and relational configuration in which the intended mother is situated, including the legal position and cooperation of the genetic intended father. These features provide the doctrinal basis for examining the gendered assumptions that shape what constitutes motherhood and when it becomes legally cognizable, and whether apparently neutral criteria governing the recognition of intended motherhood may also operate as a site of normative scrutiny.

[C] ECtHR AND GENDER STEREOTYPES

Having established the ECtHR framework for recognizing intended mothers as legal mothers, this section turns to the assumptions about motherhood that shape the conditions under which intended motherhood becomes legally cognizable, and examines how these assumptions may reflect or reproduce gender stereotypes. These assumptions are key, as they help sustain the distinctions drawn between forms of motherhood readily recognized in law and maternal relationships that may be acknowledged in practice while remaining legally unrecognized, delayed or conditional. The analysis undertaken focuses on selected ECtHR surrogacy cases—*Paradiso and Campanelli v Italy* (2017), the 2019 *Advisory Opinion*, *D v France* (2020), *Valdís* (2021), *AM* (2022) and *KK* (2022)—chosen because of their particular relevance to the construction and recognition of intended motherhood.

The analysis adopts a feminist anti-stereotyping approach. Alexandra Timmer understands stereotypes as widely shared beliefs about the characteristics of particular groups which are both a cause and a manifestation of structural disadvantage and discrimination, with gender stereotypes being particularly significant because they make gendered identities and roles appear natural, universal or self-evident, thereby obscuring their character as cultural phenomena and helping to sustain existing relations of disadvantage and inequality (Timmer 2011). In this context, gender stereotypes may operate through assumptions that treat particular characteristics or roles as naturally constitutive of maternal identity. Timmer proposes a two-stage analysis involving the "naming" and "contesting" of harmful stereotypes, aimed at identifying their role in particular cases and challenging their operation within legal reasoning (Timmer 2011: 718-719). However, the present section uses anti-stereotyping analysis as an interpretive lens through which to

examine the assumptions about motherhood embedded within the ECtHR framework examined above, rather than reproducing Timmer's Article 14 methodology in full. In particular, it asks whether apparently neutral criteria governing recognition reproduce gendered understandings of motherhood. The analysis also draws on Fleur van Leeuwen's critical feminist reading of ECtHR jurisprudence, particularly her use of "asking the woman question"[5] to explore "absences, silence, difference, oppression and the power of epistemology" in legal texts (van Leeuwen 2024: 155). Building on this approach, the present analysis asks what characteristics make motherhood appear legally self-evident, what assumptions shape the legal significance attributed to gestation, genetics, intention and care, and how those assumptions structure the Court's understanding of intended motherhood.

To achieve this, the analysis proceeds from the central organizing assumption that gestation and birth operate as the normative basis of motherhood against which non-gestational maternal claims are assessed. It first examines how that assumption operates within the Court's jurisprudence, including through the different legal significance attributed to genetic connection. It then considers two consequences of this framework: i) the limited constitutive force accorded to reproductive intention; and ii) the additional scrutiny to which non-gestational maternal claims may be subjected through apparently neutral legal reasoning concerning recognition and regulation.

Gestation, birth and the normative mother

The central organizing assumption of the Court's approach to intended mothers concerns the continuing association between motherhood, gestation and birth. This association is not created by the ECtHR's surrogacy jurisprudence. Rather, the Court encounters intended motherhood against domestic legal frameworks in which the woman who gives birth is ordinarily treated as the legal mother. For example, in *KK*, the Court noted that under Danish law the "woman giving birth to a child is always deemed to be the mother of the child and as such a legal parent of the child", even where the egg comes from another woman, a rule subsequently described as the "fundamental principle in Danish law on motherhood" (*KK* 2022: paragraphs 27-29). A similar statutory approach was endorsed in *Valdís*, where the Court accepted that the domestic interpretation that "only the woman who gave birth to a child following artificial fertilisation could be considered its mother" was "neither

[5] This method was developed in feminist legal scholarship by Bartlett (1990: 837-849).

arbitrary nor manifestly unreasonable" (*Valdís* 2021: paragraph 64). Thus, the birth-based attribution of motherhood enters the Court's reasoning as the existing legal baseline rather than as a premise itself requiring examination. Yet, through an anti-stereotyping lens, it raises the question of why gestation and birth render motherhood legally self-evident, while other bases for maternal identity do not.

Existing scholarship has already demonstrated the resilience of this association. Margaria observes that the legal definition of motherhood is still anchored in gestation and birth, endorsed by European supranational courts, making the persistent "conflation of gestation and motherhood" a central and largely uncontested assumption in the regulation of parenthood (Margaria 2024b: 182, 204). She further contrasts the relative immutability of *mater semper certa est*[6] with the greater contextual flexibility that has characterized the determination of legal fatherhood (Margaria 2024b: 182, 196-197), a contrast explored in greater detail later in this article. Therefore, rather than the Court creating a gestational definition of motherhood, its surrogacy jurisprudence operates within a legal framework in which gestation continues to function as the paradigmatic marker through which motherhood becomes immediately intelligible and legally cognizable.

From an anti-stereotyping perspective, this matters because stereotypes need not take the form of express statements about what women or mothers are. They may also operate through categories that appear natural or self-evident. The association between giving birth and being a mother can perform precisely this function. The woman who gives birth does not ordinarily have to establish why gestation should constitute motherhood, as the connection itself supplies the answer. Gestation, birth and maternal status are treated as conceptually continuous. This reflects an underlying assumption that equates womanhood with motherhood and, in turn, treats motherhood as the product of biological reproduction (Arendell 2000: 1192-1193). However, far from reflecting an immutable biological fact, *mater semper certa est* functions as "normative dogma" (Milanich 2017: 24), reinforcing a rigid model of "parental dimorphism" that ties legal motherhood primarily to gestation (McCandless & Sheldon 2010: 188; Margaria 2024a: 230-231).

Surrogacy disrupts this self-evidence and continuity by separating functions that historically tended to coincide within one person (Ragoné 1996: 353). The woman who gestates may not provide the genetic material,

[6] This is the Roman law maxim that means "the mother is always certain". For a discussion of its adequacy on surrogacy, see D'Alton-Harrison (2014).

may never have intended to parent the child and may not subsequently undertake any maternal role. Conversely, the intended mother may have initiated the reproductive project, may be genetically related to the child and may assume the social and caregiving role from birth without having gestated. However, surrogacy does not simply reveal that there are competing claims to parenthood, but it exposes the extent to which the intelligibility of motherhood has traditionally depended upon the assumed alignment of gestation, birth and maternal identity.

The different legal significance attributed to genetic relatedness makes this particularly visible. Genetics has played a central role in the Court's protection of intended fatherhood. Yet *D v France* (2020) demonstrates that maternal genetics does not necessarily perform the same legal function. Although the intended mother was genetically related to the child, the Court accepted that France could require her to establish the maternal relationship through adoption rather than through registration of the foreign birth certificate. This produced a significant asymmetry in the treatment of genetic motherhood and fatherhood, where the genetic intended mother was required to undergo an additional process of adoption despite being in the same genetic position in relation to the child as the intended father (Levy 2022: 169-170). Given that the applicants framed their complaints around the child's rights and had not properly raised a discrimination complaint concerning the intended mother's own rights, the Court did not determine the question of sex discrimination on its merits (*D v France 2020*: paragraphs 61, 81-82); *D* should, therefore, not be read as an express judicial endorsement of differential treatment. Nevertheless, the "genetic essentialism" underpinning the Court's post-*Mennesson* jurisprudence operates unevenly, because genetic relatedness can secure direct legal recognition for genetic intended fathers, while adoption is deemed a sufficient route to recognition for genetic intended mothers (Levy 2022: 169-170). Therefore, the case reveals that genetic connection does not displace the distinctive legal significance attributed to gestation in the construction of motherhood in the same way that genetics may ground intended fatherhood.

It should be clarified that this article does not suggest that genetic connection should itself determine legal parenthood. Genetic essentialism (Levy 2022) may itself operate as a naturalizing logic, treating genetic relatedness as an apparently self-evident basis of parental identity (Hargreaves 2006: 269), which obscures what has been termed as the complex "choreography" of biological and social dimensions of kinship (Wheatley 2019: 137, citing Carsten 2004). Therefore, this article does not privilege genetics over gestation, intention or caregiving. Genetic

connection is used comparatively here to demonstrate the resilience of the gestational model and the differential legal significance attributed to genetic motherhood and fatherhood.

In essence, the Court's case law on surrogacy demonstrates that the same form of genetic connection carries different legal significance. Paternal biology is principally expressed through genetic connection, whereas maternal biology remains legally intertwined with pregnancy and birth (Margaria 2024b: 196-197). This is what makes the intended mother's position particularly precarious, because even where she shares the genetic connection that strongly supports intended fatherhood, she does not necessarily occupy an equivalent legal position. This asymmetry is visible in *D v France*, where the recognition of the genetic intended mother is subjected to a domestic adoption process that can be costly and protracted and inherently involves state scrutiny of her fitness to become the legal mother of a child who is already genetically hers (Levy 2022: 171-172).

Read through the anti-stereotyping framework, the surrogacy case law consequently reflects a conception of motherhood in which gestation and birth remain the conventional reference point for understanding who a mother is. Even though the Court enables the possibility of non-gestational motherhood, as seen above, intended motherhood enters a legal framework already organized around a different, embodied model of motherhood. This gestational model constructs the normative mother and proves resilient even in the presence of genetic relatedness. Under the Court's essentialist approach, genetic connection provides a powerful basis to vindicate intended fatherhood, but for intended mothers it does not secure equivalent direct legal recognition. This imbalance matters because, as Timmer explains, stereotypes operate precisely by making gendered identities and roles appear natural and self-evident, thereby obscuring the assumptions on which they rest (Timmer 2011: 714-715). The assumption here is that genuine maternal identity naturally flows from gestation and birth, a premise that reinforces the cultural hierarchy that privileges gestational over non-gestational maternal claims and treats the latter as highly contingent (Johnson 2017: 1350-1358) and potentially subject to additional state scrutiny (Levy 2022: 171-172). Therefore, the anti-stereotyping concern is that gestation and birth may operate as an apparently self-evident paradigm of motherhood against which non-gestational intended motherhood is treated as a secondary deviation requiring special justification and scrutiny.

Reproductive autonomy and the boundaries of legitimate motherhood

Having established that motherhood becomes legally intelligible through gestation and birth as the paradigmatic markers of normative motherhood, resilient to genetic connection (which is otherwise central to fatherhood), the analysis turns to the consequences of that premise in relation to the legal significance attributed to reproductive intention. When motherhood is created deliberately outside this gestational model, intention precedes and explains the creation of the intended maternal relationship. The question, thus, becomes: what legal weight is accorded to the intended mother's reproductive choice and intention to parent in legally recognizing the mother–child relationship?

Reproductive autonomy denotes the capacity to make meaningful decisions about whether and how to procreate and to have those decisions accorded appropriate legal respect (Robertson 1994; Jackson 2001). The Court has long located such decision-making within Article 8 as part of private life which encompasses the right to respect for decisions both to become and not to become a parent (*Evans v the United Kingdom* 2007: paragraph 71), while "the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose" is a choice that constitutes an expression of private and family life (*SH and Others v Austria* 2011: paragraph 82). Conceptually, grounding parenthood in intention is closely connected to reproductive autonomy insofar as it gives legal significance to deliberate reproductive choice and individual agency in procreation and parenting (Shultz 1990). From this perspective, an intended mother's deliberate initiation of and participation in a surrogacy arrangement provides a strong basis for her intention to carry legal significance in determining maternal status.

Yet, the ECtHR surrogacy case law demonstrates that intention does not operate as an independent basis for legal motherhood. This is clearly visible in the 2019 *Advisory Opinion*, where the Court held that domestic law need not recognize the legal mother–child relationship *ab initio* but recognition must be possible "at the latest" when the relationship has become a "practical reality" (paragraphs 52-54). Since both the mechanism and criteria for recognition remain within the state's margin of appreciation, there is "no guarantee that the intended mother will be recognised as the legal mother", with domestic authorities retaining the ultimate decision-making authority over that status (Bracken 2021: 12). This structure suggests that, although reproductive intention explains the origin of the intended maternal relationship, it does not itself perform the

constitutive legal work of establishing maternal status. Legal motherhood may eventually be established, but only once other conditions render that relationship legally cognizable rather than because the woman intended from the outset to become the child's mother.

AM (2022) makes the limited constitutive force of maternal intention particularly apparent. The applicant had participated in the surrogacy arrangement with the genetic intended father and subsequently, albeit for a short period of time, acted as a mother to the child. The Court expressly acknowledged that she had "acted as a mother" with the intention of continuing to do so and that emotional bonds had been forged between them (*AM* 2022: paragraph 108). Nevertheless, adoption required the legal father's consent, which he refused after the relationship between the IPs had broken down. The Court recognized that the resulting situation was "particularly harsh" and that the intended father had effectively brought the applicant's parental project to an end but, nonetheless, concluded that the domestic authorities had adequately examined the competing interests and found no violation of Article 8 (*AM* 2022: paragraph 133). The combination of the father's unilateral decision and the passage of time ultimately prevailed despite the applicant's original intention and subsequent maternal relationship with the child (Margaria 2024b: 191-193).

AM exposed how, under the particular configuration, female reproductive autonomy became subordinate to the position of the genetic intended father. Even though the judgment does not articulate such a finding, this was the practical outcome, shaped by domestic adoption law, the child's best interests and the procedural circumstances of the case. In addition, the case demonstrates how little independent legal force is accorded to reproductive intention when intended motherhood is not already anchored in the conventional gestational model. The intended mother's decision to become a parent, her participation in creating the parental project and even her subsequent performance of the maternal role could not independently establish maternal status. Furthermore, although intention was central to the surrogacy project for both IPs, the intended mother's lack of genetic connection meant that recognition of her parenthood eventually depended on the genetic father's consent, creating a significant power imbalance between the two IPs (Iliadou 2025a: 356). Judge Jelić warned in dissent that such an imbalance of power could enable one IP to make life-changing decisions affecting the other IP's parenthood and could be misused in order to abuse the other IP (*AM* 2022: Dissenting Opinion of Judge Jelić, paragraphs 44-46).

This difference acquires a gendered significance when situated within the broader regulation of parenthood. Margaria observes that, more generally, legal fatherhood has developed in a comparatively context-sensitive manner, allowing genetics and, in some circumstances, intention to operate as legitimate bases for paternal status, whereas the determination of motherhood remains considerably less flexible, arguably leading men's intention to parent (or even not to parent) to be taken more seriously than women's reproductive intention (Margaria 2024b). Paternity was historically unverifiable at birth, which is why fatherhood was mediated through presumptions and marriage (Meulders-Klein 1990). As genetic testing became increasingly reliable, genetics increasingly supplemented and, in many contexts, displaced or rebutted the marital presumption as the primary basis for establishing legal fatherhood (NeJaime 2017: 2276-2279). Assisted reproduction, however, revealed that genetics itself was not indispensable and, in sperm donation, legal fatherhood may attach to the consenting prospective father rather than the sperm donor, allowing intention to displace genetic connection (Margaria 2024b: 197). The legal accommodation of sperm donation expanded fatherhood's non-biological capacity, while legal motherhood remained substantially grounded in biological connection (NeJaime 2017: 2290-2293).

This disparity exposes a gendered asymmetry in the legal authority accorded to reproductive autonomy and intention when viewed through an anti-stereotyping lens. The evolution of legal fatherhood has been flexible and responsive to societal and technological developments, as intention can establish paternal status without biological connection in sperm donation, while in the ECtHR's surrogacy jurisprudence an intended father's parental project receives legal recognition when reinforced by genetic connection, as illustrated by *Mennesson*. In contrast, maternal reproductive intention is not accorded equivalent constitutive force. Whether an intended mother combines intention with genetic connection, as in *D v France*, or with the actual performance of the maternal role,[7] as in *AM v Norway*, her reproductive intention does not establish maternal status but remains dependent on further legal validation, including through adoption, fitness scrutiny and the genetic father's consent. This asymmetry risks reproducing the gendered assumption that motherhood follows naturally from gestation and birth, rather than being a parental status that may also be constituted through deliberate reproductive agency.

[7] The significance of care and the performance of maternal practice for intended motherhood is considered in detail in section [D] below, particularly through the concept of "care without status".

Normative scrutiny and the apparent neutrality of legal reasoning

The analysis so far has shown that intended motherhood enters the ECtHR's surrogacy jurisprudence from a position already outside the conventional gestational paradigm through which motherhood is rendered legally cognizable. Gestation and birth remain the normative reference points for maternal status, while reproductive intention does not constitute motherhood in their absence. A further layer of complexity arises from the cross-border character of the Court's surrogacy cases, where IPs who reside in surrogacy-restrictive jurisdictions travel abroad to pursue surrogacy arrangements legally available elsewhere. In such cases, the intended mother's claim to recognition engages questions of public policy and circumvention, adding an additional layer of legal scrutiny. The question for an anti-stereotyping analysis is whether that formally regulatory scrutiny also becomes a site of normative evaluation, through which assumptions about legitimate motherhood, reproductive motivation and parental conduct enter the apparently neutral legal reasoning.

Key to this second consequence of treating gestation and birth as the normative basis of motherhood is that non-gestational maternal claims are subjected to heightened scrutiny that involves unexamined moral assumptions and institutional suspicion. Feminist family law scholarship has long exposed how legal systems actively construct "proper" motherhood and exercise surveillance and control over women who depart from dominant maternal scripts (Diduck 1993). The idea of "reproductive governance" is also useful here, because it examines how legislative controls, moral injunctions and other institutional mechanisms operate to produce, monitor and control reproductive behaviour (Morgan & Roberts 2012: 241-243). Assisted reproductive technologies generate anxieties precisely when their uses and users depart from conventional understandings of gender, motherhood and the family, while discourse and regulation operate to distinguish socially legitimate from "illegitimate" reproductive practices (Michelle 2006: 109-113). Surrogacy and intended motherhood are particularly disruptive in this respect because legal questions concerning recognition and regulatory circumvention arise alongside departures from conventional assumptions about how genetic, gestational and social relationships should translate into legal parenthood.

The manner in which reproductive autonomy and agency are socially and legally narrated also matters (Michelle 2006: 111). These narratives operate under the "common assumption that all women want to

become mothers", with cultural imagery connecting motherhood with "normality" (Donath & Ors 2022: 2). Still, reproductive desire itself is not represented neutrally. Popular representations of infertility have historically constructed women with fertility problems through narratives of "desperation", "anguish" and "suffering", framing the desire for motherhood as an intense and compelling imperative (Franklin 1990). At the same time, new reproductive technologies destabilize conventional understandings of parenthood and the "natural", but they also bring reproduction increasingly within the terrain of legal and public control (Franklin 1990: 200-201). When a woman steps outside approved social and gestational scripts, the same desire that was culturally praised is reframed as selfish, unnatural, or deviant (Teman 2008: 1105). This tension is particularly significant for intended mothers, because their reproductive project separates motherhood from conventional gestational and social scripts; hence, their reproductive intention acquires an ambivalent character, which produces a particular paradox.

The paradox in question is that the same reproductive intention that lacks sufficient constitutive force to establish her as a legal mother, as demonstrated above, may become legally salient in ways that support the state's regulatory response. While the gestational mother's legal status is treated as self-evident and requires no justification, IPs who disrupt dominant kinship norms face a form of "reproductive accounting" (Smietana & Twine 2022: 325-326), requiring them to account to the wider society for their decision to undertake surrogacy. Here, the intended mother is compelled to explain, justify and formally account for her route to reproduction through additional recognition procedures, including adoption and the associated state scrutiny. Crucially, this reproductive intention was realized through an arrangement pursued in a jurisdiction where surrogacy is lawful. The anti-stereotyping question is, therefore, whether apparently neutral doctrinal categories,[8] such as public policy (*ordre public*), circumvention of domestic laws and adoption, respond merely to a conflict with the home state's regulatory framework (ie regulatory scrutiny), or whether they function as disciplinary mechanisms that carry assumptions about intended mothers whose maternal claims depart from the normative gestational model (ie normative scrutiny).

Paradiso and Campanelli v Italy (2017) provides the clearest illustration of this dynamic. The applicants had travelled to Russia to pursue a

[8] This concern can be understood through what Gatti and Evolvi describe as "apparent rationality" and a "screen of neutrality", whereby judicial reasoning may present itself as technically objective while dominant social values remain embedded in the subtext rather than being articulated expressly (Gatti & Evolvi 2024: 798-799).

surrogacy arrangement despite surrogacy being prohibited in Italy and, although they had previously been declared suitable for inter-country adoption, had not followed the procedures required under Italian adoption law. The domestic courts treated this not only as a circumvention of domestic regulation, but as revealing something about the applicants themselves, "in particular [about] Mrs Paradiso", who had undergone treatment that had reportedly placed her life at risk and had, nevertheless, chosen surrogacy rather than the authorized adoption route. From this, the domestic court expressed concern that the child might serve to fulfil a "narcissistic desire" of the applicants or to "exorcise an individual or joint problem", and considered that the IPs' conduct cast doubt on their "genuine affective and educational abilities" and "instinct of human solidarity" (*Paradiso* 2017: paragraphs 37, 207). The domestic courts also attached significance to Mrs Paradiso's having spread a rumour that she was pregnant and having implied that she was the child's "natural" mother, treating these acts as part of a wider attempt to conceal the circumstances of the child's birth and circumvent Italian law (*Paradiso* 2017: paragraph 44).

The Strasbourg Court did not originate these characterizations, but neither did it distance itself from them. It reproduced the domestic court's concerns and accepted that the authorities were entitled to attach weight to the applicants' deliberate circumvention of Italian law and to the state's interest in preventing an unlawful situation from continuing (*Paradiso* 2017: paragraphs 207-215). The dissenting judges expressly criticized what they described as the majority's "accommodating reference" to the domestic court's suggestion that the applicants were fulfilling a "narcissistic desire" and to its doubts concerning their affective and educational abilities. The majority's stance matters, however, as "the ECtHR sets standards in human rights law both within and beyond Europe and presents an important construction site for rights narratives, including reproductive rights narratives" (Oja & Yamin 2016: 63).

An anti-stereotyping viewpoint reveals how regulatory scrutiny becomes intertwined with judgments about reproductive motivation and maternal legitimacy. Pregnancy and "natural" motherhood form part of the normative vocabulary through which Mrs Paradiso's claim is assessed, while circumvention of domestic law becomes a basis for questioning not only the route to parenthood but also the applicants' qualities as prospective parents. Thus, the reproductive project is subjected to moral scrutiny (Michelle 2006). The apparent neutrality of the reasoning lies precisely here: the doctrinal language of illegality and circumvention is formally detached from gender, yet its application permits judgments

about reproductive motivation, maternal authenticity and parental worth to enter the analysis without those underlying assumptions about motherhood themselves being examined. Persistence in becoming a parent, rather than being understood solely as an exercise of reproductive autonomy, becomes capable of being read as narcissistic, excessive or suspect. The gendered dimension is particularly striking in the emphasis placed on Mrs Paradiso's willingness to endure repeated and medically risky fertility treatment. Within a cultural framework in which women are expected to desire motherhood, and in which infertility has historically been narrated through "desperation", "anguish" and "suffering" (Franklin 1990), narratives that might ordinarily elicit sympathy, her determination to become a mother becomes part of the evidential basis upon which that desire may be construed as excessive or pathological. Therefore, the three issues examined above converge here: first, gestation renders conventional motherhood legally self-evident; second, reproductive intention lacks equivalent constitutive force; and, third, when legal recognition is sought, that intention may become subject not only to regulatory scrutiny but also to normative scrutiny through apparently neutral legal reasoning. The resulting disjunction between maternal practice and legal status is developed in the following section through the concepts of "care without status" and "derivative motherhood".

[D] CARE WITHOUT STATUS AND DERIVATIVE MOTHERHOOD

Section [C] demonstrated why intended motherhood remains legally precarious. This section turns to the consequence of that precarity once maternal relationships are lived in practice. The ECtHR's surrogacy jurisprudence reveals a recurring disjunction between maternal practice and maternal legal status, as an intended mother may initiate the reproductive project, assume day-to-day care and be socially situated as the child's mother, while lacking corresponding legal maternal status. This article conceptualizes that condition as "care without status". A related question then arises as to the structure through which legal motherhood is eventually recognized. Where recognition is granted, it may depend upon mediated and conditional pathways external to the intended mother's own intention or maternal practice. This article captures that structure through the concept of "derivative motherhood".

"Care without status" identifies the disjunction between the lived performance of motherhood and its formal legal recognition, where "status" denotes legal parenthood and not other forms of accommodation

of care. Rather than suggesting that caregiving should, by itself, determine legal parenthood, the term captures the more specific position in which maternal intention, care and an established relationship with the child are visible to the authorities, yet they remain insufficient to constitute maternal legal status. The distinction is important because, in some cases, the ECtHR, far from ignoring the intended mother's maternal role, expressly acknowledges it, but what remains uncertain is the legal force attached to it.

Valdís (2021) provides the clearest illustration of this problem. Neither intended mother was genetically related to the child and Iceland refused to recognize them as the child's legal parents. Yet the authorities placed the child in their foster care and, after their subsequent divorce, arrangements were maintained under which the child alternated between the two women while retaining access to each (paragraphs 12, 60). The Strasbourg Court accordingly accepted that "family life" existed among the applicants, notwithstanding the absence of legal parenthood (paragraphs 61-62), and attached weight to the measures taken by the state to preserve that family life (paragraphs 71-75).

Valdís illuminates precisely this coexistence of recognition and non-recognition. The intended mothers were sufficiently maternal for their relationships with the child to constitute protected family life and for the state to organize the child's continuing care around them, but not sufficiently maternal for either woman to acquire the corresponding legal status of mother. Hence, the case demonstrates that the function of maternal practice (here, caregiving) can be acknowledged and legally accommodated without being translated into maternal status, which remains without recognition. It is this condition that the concept of "care without status" seeks to capture.

The same disjunction is visible, albeit in a different form, in *KK* (2022). The intended mother had lived with and cared for the twins since their arrival in Denmark, but Danish law did not recognize her as their legal mother. She was nevertheless granted joint custody with the genetic father (paragraph 8), and the Strasbourg Court accepted that the applicants were able to enjoy family life together without practical obstacles (paragraphs 49-51). The precarity, therefore, did not consist in the absence of all recognition of her caregiving role, but in the absence of a legal parent–child relationship corresponding to that role. When Danish law made step-parent adoption unavailable because remuneration had been paid to the surrogate, the intended mother remained a caregiver with joint custody but without maternal legal status (paragraphs 11, 14-15). The

Court ultimately found a violation only of the children's right to respect for their private life, concluding that the available legal arrangements did not sufficiently compensate for the impossibility of establishing a legal parent–child relationship with the intended mother (paragraphs 70-77). The case, therefore, illustrates not only "care without status", but also the mediated structure of recognition developed below through the concept of "derivative motherhood".

At its outer boundary, the gap between maternal practice and maternal status may also render the caregiving relationship vulnerable to termination. In *Paradiso* (2017), the child was removed from the IPs and all contact ceased. Despite Mrs Paradiso having provided uninterrupted, maternal care to the infant "to the highest standards" for eight months (paragraphs 25, 106), the Grand Chamber found no violation regarding the child's emergency removal and placement for adoption. By prioritizing the need to bring an "unlawful situation" to an end, the Court permitted the complete dismantling of a functional, care-based maternal bond due to the absence of genetic ties, the brief duration of cohabitation and the "legal uncertainty created by the applicants themselves" (Iliadou 2019: 148). In *AM* (2022), examined in more detail above, the same precarity appeared in a different form: the intended mother's inability to secure legal status left the continuation of her maternal relationship vulnerable to the genetic father's refusal to consent to adoption.

The distinction between functional parenthood and formal legal parenthood is well established in family law scholarship, particularly in debates concerning functional, *de facto* and intentional parenthood, with some scholars advocating functional or intention-based approaches (Storrow 2002) and others questioning the suitability of functional approaches as a basis for determining legal parenthood (Baker 2017). "Care without status", however, captures a narrower phenomenon within the ECtHR's surrogacy jurisprudence, where the intended mother's maternal practice may be legally visible, acknowledged and even protected while remaining insufficient to constitute the corresponding legal status of mother. This sits uneasily with the Court's broader understanding and protection of *de facto* family ties (Iliadou 2019: 146-148). An anti-stereotyping perspective exposes a significant gendered tension. Within dominant heterosexual family ideology, intensive mothering is culturally prescribed as a gendered expectation, portraying the good mother as child-centred, devoted and self-sacrificing (Arendell 2000: 1194).[9] Yet, within the Court's surrogacy reasoning, that very same labour does not

[9] On the "good" versus "bad" mother trope in surrogacy, see Abrams (2015: 180-183).

carry equivalent constitutive force. The legal order readily accepts the intended mother's lived caregiving but refuses to let that labour generate independent maternal status.

In this respect, "care without status" identifies a form of structural marginalization that may be obscured by apparently neutral legal terminology. As demonstrated in *Valdís* and *KK*, mechanisms such as foster care and joint custody can operate as partial substitutes for legal parenthood. They regulate and preserve the functional caregiving relationship without themselves constituting the intended mother as the child's legal mother. Lived maternal practice is thereby decoupled from maternal legal identity. By treating care as legally relevant but insufficient on its own terms to constitute motherhood, the Court's reasoning risks reinforcing the hierarchy identified in section [C], in which gestational motherhood remains legally self-evident while non-gestational motherhood requires additional validation. This raises the further question of how legal recognition is secured when it is ultimately granted, which is addressed next through the concept of derivative motherhood.

If "care without status" captures the disjunction between the function of motherhood and its legal status, "derivative motherhood" describes the structure through which that status becomes legally cognizable. The concept builds on broader scholarship concerning derivative parenthood that has been employed in different senses. Lynda Wray Black uses "derivative parentage" to identify a chronologically secondary route to parenthood, expressly clarifying that the term denotes neither moral nor *de facto* inferiority (Black 2014: 832, footnote 192). Gregg Strauss nevertheless rejects Black's distinction between "primary" and "derivative" parentage because it risks suggesting that genetics itself generates moral parentage, arguing instead that genetic connection gives rise only to a liberty to pursue parenthood, with parentage ultimately grounded through caregiving (Strauss 2025: 80, footnote 101). These competing formulations demonstrate that "derivative" may refer either to the temporal route through which parenthood is acquired or, alternatively, to the legal basis upon which parental status is recognized.

In the ECtHR surrogacy context, Margaria observes more specifically that the 2019 *Advisory Opinion* constructs motherhood as "a derivative of fatherhood", because the intended mother's route to recognition is mediated through the prior recognition of the genetic father (Margaria 2020: 424). This formulation draws attention both to the temporal sequencing and to the conditionality of recognition, since the intended mother's status becomes legally cognizable through an already recognized parental

relationship that precedes and partly structures the legal validation of her own claim, rather than through an autonomous maternal entitlement.

Building on these accounts, this article uses "derivative motherhood" to describe a particular structure of legal recognition affecting intended mothers in surrogacy. The term does not convey an inferior form of maternal identity, nor does it suggest that intention, care or genetics should themselves operate as absolute grounds of maternal status. Rather, it identifies a legal structure in which the intended mother's status is assessed and secured through rights and legal positions already recognized in others, principally the child and the genetic father, without her own maternal relationship and Article 8 interests themselves providing an autonomous basis for maternal status. This also distinguishes derivative motherhood from a broader relational understanding of family life and parenthood, in which interdependence and connection are central. As Jonathan Herring notes, "[p]eople do not understand their family lives as involving clashes of individual rights or interests, but rather as a working through of relationships" (Herring 2014: 20). Derivation, however, involves a specific form of legal dependency. In the present context, it captures a particular asymmetry in the legal construction of motherhood, where gestational motherhood operates as an originating status, whereas intended motherhood is required to pass through additional forms of legal authentication.

The mediating structures identified previously through the ECtHR surrogacy case law demonstrate that, first and foremost, intended motherhood is mediated through the child's own right to private life, rather than through the intended mother's autonomous rights (eg *Mennesson* 2014; *KK* 2022). Second, it is mediated through the legal position and consent of the genetic intended father, where his genetic relatedness becomes the anchor for her legal status, rendering it ancillary (eg 2019 *Advisory Opinion*; *AM* 2022). Finally, intended motherhood may be mediated through domestic adoption, which subjects the intended mother to additional legal scrutiny rather than treating reproductive intention or lived caregiving as independently constitutive of maternal status, a requirement that persists even where she shares a genetic link with the child (*D v France* 2020). Genetic connection operates somewhat differently, as it is an additional criterion affecting the strength and route of recognition, but does not itself eliminate the need for legal validation. These mediating factors reveal that intended motherhood acquires legal force through additional sources of validation external to the intended mother's own intention and maternal practice.

Naming this structure as "derivative motherhood" brings into view a recurring form of legal dependency that may otherwise remain obscured by discrete and apparently neutral rules concerning genetics, children's rights, adoption and domestic recognition. It thereby enables scrutiny of why intended motherhood, unlike gestational motherhood, repeatedly requires an additional source of legal validation.

The importance of this structure becomes clearer when contrasted with the conventional legal construction of parenthood. Fatherhood has historically been the mediated status (Margaria 2020: 424), whereby, as explained earlier, marriage and presumptions connected a man to a child through his relationship with the woman who gave birth, while motherhood followed directly from gestation and birth. In the surrogacy jurisprudence examined here, that conventional direction of derivation is partially reversed. Genetic fatherhood may operate as the originating legal relationship, while the intended mother's status becomes mediated through the father–child relationship and other forms of legal validation (Margaria 2020: 424). Derivative motherhood, therefore, describes not merely a delayed route to recognition, but a reordering of the conventional architecture of parenthood in which the status traditionally treated as immediate becomes the status requiring mediation.

Taken together, "care without status" and "derivative motherhood" reveal a form of motherhood whose legal recognition is conditional and mediated. The intended mother may be central to the reproductive project and to the child's lived family life, yet neither intention nor maternal practice independently generates legal status. "Derivative motherhood" captures this structure of dependency through which recognition is secured, while "care without status" captures the disjunction between performing motherhood and possessing maternal legal status. Ultimately, the concepts expose a form of intended motherhood that may be socially real and emotionally established, while remaining legally contingent.

[E] CONCLUSION

This article has examined the ECtHR's surrogacy jurisprudence on intended motherhood through an anti-stereotyping lens. Its central argument is that, in Strasbourg's surrogacy case law, gestation and birth continue to operate as the paradigmatic basis through which motherhood becomes legally self-evident, while non-gestational maternal claims, including those supported by genetic connection, require additional justification. As a consequence of that, reproductive intention does not carry equivalent constitutive force for intended mothers. Neither

reproductive intention nor the subsequent performance of the maternal role independently establishes maternal status. Another consequence flowing from the rigid gestational model is that, where intended motherhood seeks legal recognition, reproductive intention may re-enter legal reasoning not as a basis for parenthood, but through concerns about circumvention, legitimacy and reproductive conduct, leading to a double regulatory and normative scrutiny. Taken together, the above demonstrate that the ECtHR's apparently neutral framework for recognition operates within, and may reproduce, gendered assumptions concerning the conditions under which motherhood becomes legally intelligible.

The consequences of this framework have been conceptualized through "care without status" and "derivative motherhood". "Care without status" captures the disjunction between maternal practice and maternal legal status, whereby an intended mother may initiate the reproductive project, care for the child and establish a socially and emotionally meaningful maternal relationship without acquiring corresponding legal maternal status. "Derivative motherhood", in turn, identifies the structure through which recognition becomes legally cognizable, as intended motherhood is mediated through additional sources of validation, including the child's Article 8 interests, the legal position of the genetic intended father and domestic mechanisms such as adoption. Naming this structure makes visible a recurring form of legal dependency that may otherwise appear as a series of discrete and apparently neutral rules. Together, the two concepts expose how the Court's surrogacy jurisprudence not only regulates parenthood recognition but also helps determine which forms of motherhood are treated as legally self-evident and which remain conditional upon external validation.

About the author

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A Relational Approach to Surrogacy and Assisted Reproduction: Opportunities and Limits in Legal Practice

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Abstract

This article applies a relational approach to assisted reproduction law in practice. It considers the role of legal practitioners in positively supporting the relationships arising from these arrangements at three key stages, namely (a) creating and maintaining adult relationships, (b) validating or legalizing parental relationships, and (c) managing any conflict that arises. With a primary focus on surrogacy arrangements, it considers not only the limitations of the current law of assisted reproduction when viewed through this lens, but also possible solutions. Proposals include both statutory reform and professional best practice.

Keywords: surrogacy; assisted reproduction; relational approach; legal parentage; parental orders; legal practitioners; alternative dispute resolution; reform.

[A] INTRODUCTION

Historically, law in practice has not been conducive to a relational approach.[1] Typically characterized by adversarialism (Trinder & Ors 2014: 4.2; McFarlane 2024), the idea that someone must "win" does not sit naturally with this lens or approach. Doubtless, there has been a move away from that way of thinking in family law, and perhaps no more so in context of surrogacy or assisted reproduction technology (ART) more generally. Other than in rare instances, this is an unusual area of law

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[1] Understood by this article to mean a framework of thinking which recognizes and seeks to foster and support positive relationships, recognizing their importance to both individuals and society. Inherent to this is acknowledging and appropriately redressing power imbalances that arise from both interpersonal and wider social dynamics, whether through law or other more appropriate mechanisms.

in that everyone involved is usually working towards a common goal. While legal practitioners may not expressly use the language of relational rights, they are clearly engaged with them—first in their efforts to make sure that these arrangements proceed smoothly, but also in managing conflict in those instances where they do not.

Undoubtedly, however, limitations remain. Some are the result of the legal framework in England and Wales, particularly in relation to surrogacy. The Law Commissions of England and Wales and Scotland jointly reported in 2023, recommending a comprehensive programme of modernization and reform of surrogacy law (*Building Families through Surrogacy: A New Law*). Key proposals included the introduction of a new legal "pathway" for domestic surrogacy arrangements which would allow intended parents to be recognized as the legal parents from birth, possible dispensation of the need for surrogate consent where required by the child's welfare (expanding the currently limited grounds of dispensation where a surrogate lacks capacity or cannot be found), and closer regulation of surrogacy agencies. To date, these reforms have not been progressed and it remains to be seen whether and when meaningful changes are made.

Other challenges are inherent to legal processes—in particular, the static nature of contractual arrangements and limited scope for collaboration in litigation. These would likely persist even if there were to be statutory reform, and also affect other areas of ART. As this article seeks to demonstrate, taking a relational approach allows for identification of areas for potential improvement and prospective solutions on both counts.

Rather than proposing wholesale policy reform, this article focuses specifically on the role of legal practitioners in positively supporting the relationships arising from assisted reproduction arrangements—in particular, their function in (a) creating and maintaining adult relationships, and (b) validating or legalizing parental relationships. This is followed by short, concluding reflections on (c) managing any conflict that arises. The primary focus of the article is on surrogacy arrangements. Typically, the most intensive relationships to arise from ART, they often require much closer management. Several of the observations, however, particularly in relation to conflict management, are relevant and could be applied to wider forms of ART.

[B] CREATING AND MAINTAINING ADULT RELATIONSHIPS

Creating relationships in surrogacy—the current framework

It is well documented that the adult relationships created by surrogacy arrangements vary dramatically both between jurisdictions and within England and Wales (Jadva & Ors 2019; Payne & Ors 2020). A key feature of domestic surrogacy regulation is that, whilst gestational carriers can be reimbursed for reasonable expenses, arrangements cannot be for profit—they must be "altruistic" rather than commercial. One of the benefits of this model is sometimes said to be that it allows for closer or more meaningful relationships to emerge between intended parents and surrogates as they undertake a shared journey together (Baker 1996: 41). In contrast, it is at times the case that surrogates in international arrangements do not speak English or otherwise remain at an arms-length from intended parents (Jadva & Ors 2019).

In the eyes of the law, there is a wide breadth of possible, legitimate relationships. What is essential in practice, however, is ensuring that the parties are on the same page. In the emotionally intensive process of surrogacy, it is unsurprising that mismatched expectations or understandings can leave one or both parties disappointed. In the worst-case scenario, this can lead to total relationship breakdown—a notable example being *Re AB (Surrogacy: Consent)* (2016). In that instance, while the surrogate did not wish to care for the children herself, she would not provide her consent to a parental order being made as required by section 54(6) Human Fertilisation and Embryology Act (HFEA) 2008 as she felt the applicants had not shown sufficient concern for her wellbeing during the pregnancy. As there is no ability for the Court to dispense with the surrogate's consent (aside from in very limited circumstances including where the surrogate cannot be found or is incapable of giving agreement, section 54(7) HFEA 2008), a parental order could not be made. While the children remain cared for by their intended parents, this is under a child arrangements order (under section 8 Children Act 1989) rather than a parental order, meaning the surrogate and her husband retain legal parentage and parental responsibility for the children, and that the two intended parents (who are also the children's biological parents) do not hold legal parentage for the children. It also means that all four adults share parental responsibility for the children. As observed by the court, this does not accurately reflect their identity as surrogate-born children.

Clearly, therefore, expectation management is essential from the outset to ensure strong adult relationships are created and maintained—and, by extension, preserve the best interests of children born through such arrangements.

There are jurisdictions where legal professionals play a significant role in this. In so-called "free market" regulatory states (Scherpe & Ors 2019) such as California, for example, there is considerable scope for contractual provisions tailored to the wishes and feelings of the parties. This at least ensures that the parties' expectations have been given meaningful consideration in advance. This is typically done with the support of both surrogacy agencies and lawyers, providing clear parameters for the relationship in both the immediate and longer term. Such support and certainty is no doubt part of why many intended parents here travel abroad to undertake surrogacy arrangements (Horsey 2025: 59).

For professionals in England and Wales, striking the balance between supporting clients and legal compliance is more challenging. Under the Surrogacy Arrangements Act 1985 (SAA 1985) as it stands, it is a criminal offence for any person to make, negotiate or facilitate the making of a surrogacy agreement in the United Kingdom (UK) on a commercial basis (section 2 SAA 1985). This was considered as part of the Law Commissions' surrogacy reform project referred to above. They record observations made at the time the 1985 Act was enacted, that:

> Perhaps the most serious danger posed by this piecemeal legislation is its encouragement of amateurish agreements … The couple and the surrogate are left to stumble through the process without the advice of experts. It is most unfortunate that a law that does not condemn the agreement itself does not permit the parties to pursue it in a professional manner (Eaton 1985: 172).

The Law Commissions' report further records that:

> Lawyers to whom we spoke at the time of writing the Consultation Paper saw the current prohibition in the SAA 1985 as a prohibition on providing advice on, negotiating, or drafting in respect of surrogacy agreements into which their clients had entered (2023: paragraph 14.73).

These concerns are also consistent with judicial commentary, with King J (as she then was) observing in *JP v LP & Ors* (2014) that solicitors who had charged the parties to draft a surrogacy agreement (at the request of the hospital where the child was to be born) were in breach of section 2 SAA 1985.

Following responses from multiple actors including the Law Society and leading solicitors in the field supporting the removal of this prohibition, the Law Commissions' report observed that:

> Allowing assistance by advising on or negotiating written surrogacy agreements will help to ensure that surrogacy teams are clear about the consequences of entering into the agreement. This should reduce the potential for disagreement and might also reduce the likelihood of surrogacy arrangements breaking down (Law Commissions 2023: paragraph 14.88).

As part of a wider proposed framework, including regulated surrogacy organizations managed by the HFEA 2008, the Law Commissions therefore recommended that "regulated legal professionals will be able to provide these services on a profit-making basis" (2023: paragraph 14.92). This would allow solicitors and barristers among others to provide these services and play an active role in the creation of these relationships without fear of legal repercussion.

Maintaining relationships—feasible for legal professionals?

To some extent, as demonstrated by responses to the Law Commissions' consultation, creating and maintaining adult relationships in surrogacy arrangements are two sides of the same coin. The clear intention is that having a well-defined framework for the parties from the outset will reduce the risk of crossed wires and consequent breakdown between the parties. In many instances, it seems likely that this will be the case. By drawing on their experience, practitioners can ensure that clients have reflected on and accounted for scenarios they may not have otherwise considered or discussed: whether they agree to genetic testing; what if it is a multiple pregnancy; who will be present for medical appointments and the birth; will there be any contact post-birth, and so on? Considering such minutiae before conception—when all parties have a chance to meaningfully reflect on and respond to the wishes of the others—is clearly less pressurized and relationally risky than doing so during a pregnancy.

Yet, equally, it must be recognized that there are limitations on the extent to which professionals can maintain these relationships. Surrogacy agreements are not enforceable; while they may assist to set the expectations of parties, they cannot formally bind them. Even if legal reform is introduced, it seems highly unlikely that this will substantively change. The draft Bill provided by the Law Commissions following the conclusions of their project retains a provision that they remain unenforceable; the report noting that this is necessary to ensure

appropriate respect for the surrogate's autonomy (2023: paragraphs 1.60, 4.64). Looking to family law more generally in this jurisdiction, it is again rare to see a strict application of contractual principles. Parties will not necessarily be strictly bound to pre-nuptial agreements—for example, it being recognized that the relational nature of family life may mean that circumstances justify departing from this (*Radmacher (formerly Granatino) v Granatino* 2010). While it is important to recognize that there are differences between assisted reproduction and the other adult relationships that family law regulates—in particular, the daily lives and emotions for one another of a surrogate and intended parents are not typically so intertwined as a couple in a romantic relationship—the policy considerations are sufficiently similar that it is likely the same logic will apply. In particular, it is unlikely that determinative weight will be afforded to surrogacy arrangements given the risk that a surrogate's ability to give informed consent may have been adversely impacted by an imbalance in power, there may be unanticipated changes in personal health or circumstance, or the best interests of a child may demand a different outcome.

Perhaps more significantly, written agreements or contracts are by their nature largely static. Relationships are dynamic. In surrogacy arrangements where there is direct communication between the parties, it is almost inevitable that their connection will evolve over the course of the process. While supported by a clear understanding from each side of the other's expectations, in reality it is almost impossible to define or control such progression through the mechanism of a previously agreed written document.

Having acknowledged the limitations of hard law, where does this leave practitioners? Clearly, alternative forms of dispute resolution are likely to be central to providing a constructive solution. These are explored in further detail below.

In considering how practitioners might best implement a relational approach to surrogacy and ART more generally, however, it is also critical to acknowledge the need for a collaborative professional approach. As well as remaining up to date with literature and guidance from other fields such as psychology or child development, it is suggested that practitioners should also seek opportunities to build networks with professionals from such disciplines. Building personal knowledge and otherwise seeking advice and support, not only through court-ordered reports but also at an informal level (while respecting client privacy), would help support clients struggling to maintain these relationships, as

well as ensure that appropriate referrals can be made at an early stage if required. This would further complement the mandatory implications *ex ante* counselling proposed by the Law Commissions, should that recommendation be implemented.

[C] VALIDATING PARENTAL RELATIONSHIPS

It would be artificial to suggest that legal professionals play any meaningful role in creating or maintaining many aspects of the parental bond following assisted reproduction. They are, however, often central to one specific aspect of this: ensuring recognition and validation of the intended parents' legal status.

While again there are some jurisdictions which confer legal status onto intended parents prior to the birth of the child,[2] England and Wales adopts an *ex post* approach, with intended parents only becoming eligible for parental orders following the birth of the child. England and Wales also applies an extra-jurisdictional approach, meaning that, regardless of the position in the foreign state, a parental order will need to be secured in England and Wales in order to transfer legal parentage and parental responsibility from the surrogate (and any spouse) to the intended parent(s). Statistically, it is apparent that the vast majority of these orders are made without difficulty. Hundreds of parental order applications are made each year, with only a handful of such cases being reported. There is simply no need to do so where the intended parents have straightforwardly complied with the statutory criteria. Often, they will have done so having consulted a legal professional in advance of embarking on a surrogacy arrangement, to ensure that intended parenthood can be fulfilled. Such professionals may well have liaised at the outset with partners in other jurisdictions and areas of law (such as immigration) to navigate the intersecting legal frameworks.

Yet, while it is right to say that the vast majority of cases proceed without incident, it must also be acknowledged that the primary cause of surrogacy litigation in England and Wales is not disagreements between parties, but problems with establishing compliance with the statutory criteria such that the parental relationship may be legally validated.

Unsurprisingly, prospective parents will at this stage often instruct legal professionals to access the necessary assistance. Case law reflects that, frequently, their role involves finding creative legal solutions that

[2] For instance, several American states including California and Nevada and other jurisdictions including South Africa and Greece (Scherpe & Ors 2019).

will allow for validation of the parental relationship despite any apparent difficulties. Indeed, perhaps more than any other area, modern family case law is an area where the law has had to find a way to mould and adapt to relationships and circumstances where there are, or potentially are, issues with statutory compliance. Important examples of this have included:

a. relying on section 3 Human Rights Act 1998 to read down provisions of section 54 HFEA 2008 such that parental orders can be made even where those requirements have *prima facie* not been complied with, including the following examples: *A v P (Surrogacy: Parental Order: Death of Applicant)* 2011; *Re X (A Child) (Surrogacy: Time Limit)* 2014;
b. less usually, relying on section 4 Human Rights Act 1998 to make a declaration of incompatibility and thereby to (hopefully) trigger legal reform, such as *Re Z (A Child) (No 2)* (2016) which declared that the statutory exclusion of single applicants from applying for a parental order was incompatible with Article 14 taken in conjunction with Article 8 of the European Convention on Human Rights, catalysing the introduction of section 54A HFEA 2008;
c. where there are insurmountable challenges with obtaining a parental order, considering alternative routes to secure parental responsibility and/or legal status in relation to the child, such as child arrangement orders or adoption orders, sometimes combined with orders to limit the surrogate's parental responsibility (if she retains this). Examples include: *Re H (Surrogacy: Step-Parent Adoption)* (2023); *Re N (Adoption: Surrogacy)* (2024); *Re Z (Surrogacy: Step-Parent Adoption)* (2024); *C v E (International Surrogacy and Domestic Adoption)* 2025; *Re J (A Child) (Surrogacy: Adoption Order)* (2025); *Re Z (Unlawful Foreign Surrogacy: Adoption)* (2025).

There is little doubt that such creativity has facilitated adjustments and updates to the law which reflect the reality and modern practices in relation to families and their formation. Yet, equally clear is that such litigation is not only acutely stressful for the parties involved, but also puts the best interests of the children at risk. Being caught in litigation, with uncertainty as to their legal status, is not in their welfare interests.

While there may be significant room to improve the statutory framework to facilitate legal representation when entering into surrogacy arrangements and professional involvement in other aspects of such arrangements, other barriers will inevitably remain. Most obviously, legal advice is not always affordable for prospective parents. It is well documented that many of the cases which have required such legal

creativity or untangling have arisen because prospective parents have not accessed advice in advance; instead entering do-it-yourself arrangements without knowing or considering the long-term implications (Jackson 2015: 31).

Confronted by this more and more often, a secondary or more general role has also increasingly emerged for legal professionals. They and the courts are now frequently working collaboratively to produce guidance for prospective parents. A particularly notable example of this is the decision of Theis J in *Re Z (Foreign Surrogacy)* (2024), in which the court considered a surrogacy arrangement entered into by same-sex parents. Unbeknownst to them at the time, neither the country of origin of the surrogate nor the jurisdiction where the child was born permitted same-sex surrogacy, resulting in the intended parents being encouraged by the agency to mislead the authorities in that state.

Theis J strongly emphasized the need to obtain independent legal advice before entering into any such arrangement. Beyond this, she expanded on and endorsed a list of sixteen key issues proposed by counsel as matters that any person considering on embarking a surrogacy arrangement should consider. These are set out in the judgment in full (*Re Z (Foreign Surrogacy*: paragraph 4) and include: (a) what the legal framework is in the country where the surrogacy arrangement is due to take place and where the child is to be born; (b) whether the surrogate speaks and/or reads English and if not, what arrangements are in place to make sure any agreement signed is understood; and (c) what are the proposed arrangements for contact between intended parents and the surrogate during the pregnancy and/or after birth.

This list was subsequently "readily endorse[d]" by McFarlane P (as he then was) in *Re Z (Unlawful Foreign Surrogacy: Adoption)* (2025). A case arising from similar facts, it had taken the intended parents four years to obtain visas to return with their children to the UK after they were left both without clear documentation and stateless, having been born to same-sex parents in Northern Cyprus, where neither surrogacy nor same-sex parents are recognized. The published judgment expressly sets out that it is intended to "draw attention" to the circumstances of the case and "offer some advice" (*Re Z (Unlawful Foreign Surrogacy: Adoption)*: paragraph 1). In a section of the judgment marked "lessons to be learned", the observations of Theis J in *Re Z* are expanded on to include early consideration of any Home Department, Department for Education and/or Department of Health and Social Care issues that may arise, including in relation to immigration.

Most recently, the factors were expanded on by Knowles J in *Re B (Foreign Surrogacy: Welfare Issue: Ages of Applicants)* (2025). While ultimately concluding that it was in the welfare interests of the child to make a parental order in favour of the 72-year-old applicant parents, she encouraged intended parents to give particular thought to the future welfare of a child in the event of their incapacity. Knowles J specifically identified (in *Re B (Foreign Surrogacy)*: paragraph 35): (a) estate planning; (b) future care and financial arrangements for the child in the event of incapacity of one or both intended parents; and (c) future care and financial arrangements for the child in the event of the death of one or both intended parents, as factors to be considered. She noted that this will be of particular importance for single applicants.

Perhaps the greater question for lawyers is whether this information is sufficiently disseminated to the wider public. Williams J in his recent decision of *A&B v C&D* (2026) is clear in his view that it is:

> Intended Parents who choose to seek surrogacy in countries where the case-law of this Court or publicly available information shows there are serious risks of unlawful or unethical practices take a serious risk with the welfare of the child and can expect that an application for a Parental Order will face appropriate and proper scrutiny of their suitability to become the legal parents of the child and any risks to the child that they pose (paragraph 83).

It is right to observe that judgments are freely available in the National Archives and on Bailii. They are also frequently the subject of further discussion on legal blogs and podcasts. It certainly is not hard to find information if you know where to look; it even seems likely that some diligent prospective parents will access this judicial and professional guidance without legal representation. Yet, equally, the complexity of the relevant legal principles, even if located, are likely to be overwhelming for many intended parents, without further explanation from an experienced professional. With that in mind, it may be worth considering whether there are other ways of communicating such guidance more widely—for instance, by making sure it is shared with and translated for surrogacy organizations both domestically and in other jurisdictions—to ensure that it has the best possible chance of reaching those that need to hear it. This will offer those embarking on surrogacy arrangements further (indirect) legal support to ensure that their parental status can be legally recognized.

[D] MANAGING CONFLICT: A GREATER ROLE FOR ALTERNATIVE DISPUTE RESOLUTION?

Inevitably, all litigation must come to an end. The greatest challenge for many family law litigants, however, is that this does not necessarily close the book on their relationship with one another. On the contrary, this will often need to subsist in some form—particularly where a child is involved.

It is easy to overlook this in the heat of litigation. Correspondence is passed through solicitors; parties focus on reaching the outcome they want without looking past it. This presents a degree of tension for legal professionals. On the one hand, there is acute awareness of the damage that contested litigation can cause. Indisputably, "raising the temperature" in this way causes damage to adult relationships in the long run, which all too often will have a negative knock-on effect for children (McFarlane 2024). It is only right that clients are advised of this when considering their options and strategy.

Yet, the inevitable reality is that if clients nonetheless choose to litigate (or feel they have no choice but to do so), the focus of that strategizing shifts. The primary focus must be building a case that will result in the outcome desired at trial, which may include raising concerns and criticisms of the other party. After a final order is made, legal professional involvement then typically falls away—leaving the clients to deal with the fall-out in the months and years to come.

As one way of resolving that tension, there has been a noticeable rise in the use of alternative dispute resolution (ADR) in recent years. This is increasingly endorsed across all disciplines of civil law following the Jackson reforms (Ministry of Justice 2011) but is perhaps more apposite in family law than any other because of its intensely personal nature.[3] Though many forms have emerged, mediation is a commonly used option. Of its many benefits, this provides parties with neutral support in expressing their concerns and finding bespoke solutions. There are some professionals with specific experience of surrogacy, co-parenting arrangements, fertility law, and LGBT families, who have been valuable in assisting with managing expectations, setting intentions, exploring emotions, and reaching agreements between the relevant adults, before, during and/or after litigation (and before and after the birth of the child). This includes mediators as well as counsellors and therapists. Indeed, in

[3] As discussed by Knowles J, *X v Y* (2024: paragraph 16), in particular, pre-dating but considering the subsequent reforms to the Family Procedure Rules (FPR) including the introduction of FPR 3.4(1A) and amended Practice Direction 3A.

Re Z (Surrogacy: Step-Parent Adoption) (2024: paragraphs 252-253), for instance, Theis J explicitly set out how she expected the parties to engage in appropriate therapy and support in order to improve their relationships, and discouraged them from returning to court in the future, describing this as "inimical" to the child's welfare.

It is right to recognize that this endorsement of ADR (mediation, but also alternative forms such as arbitration or early neutral evaluation) is subject to two key caveats. Firstly, although this remains a very valuable (albeit still underutilized) tool, this does not remove the need to undertake court proceedings in those cases where legal parentage needs to be transferred, which can only be done by the court: albeit in those cases, these services can be used to, as far as possible, lessen the impact of litigation and create as consensual an approach as possible. There will also, however, be cases where ADR must be approached with caution or may not be suitable at all. There are a range of factors that may render out-of-court resolution inappropriate—including safeguarding concerns, urgency, or concerns around significant power imbalances including domestic abuse. Both legal practitioners and ADR facilitators should be familiar with this from private child law work more generally, however, they should also be alive to the risk of these dynamics presenting in assisted reproduction cases.

[E] CONCLUSION

While legal practitioners may not have always been natural bedfellows with a relational approach, it clearly provides a useful framework through which to consider both legal reform and professional best practice in the field of assisted reproduction.

Adopting this lens firstly allows key limitations within this area of law to be identified. Some of these, for instance current restrictions on professional support for surrogacy arrangements, will require statutory reform. Applying a relational lens yet further underlines the benefits of implementing the current Law Commissions' proposals, as already advocated for by many practitioners in this area.

Others, however, are not so easily corrected through legislation—for instance reconciling the rigidity of law with the dynamism of interpersonal relationships. Yet, once familiar with a relational way of thinking, it becomes far easier to identify how practitioners may best support clients throughout the three stages identified in this article. This lens emphasizes that the nature of these arrangements is such that the

traditional, adversarial model of law is often uncalled for and, frequently, entirely unhelpful. Best practice instead requires careful consideration of cross-disciplinary collaboration, creative communication not only with clients but lay parties more widely, and the application of increasingly familiar frameworks, such as ADR, to novel relationships. Such solutions can be implemented irrespective of statutory reform—and indeed may become all the more important if this remains stagnant.

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Autonomy and the Lawyer's Role: Enabling Choice or Exercising Control? Insights from Adult Social Care Practice

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Abstract

This note examines the tension between autonomy and protection in adult social care law and practice. Drawing on the authors' experiences and the legal frameworks governing care, support and mental capacity, it explores how efforts to promote welfare and manage risk may restrict autonomy and liberty. Particular attention is given to the role of local government lawyers in advising social work professionals on the legality, necessity and proportionality of interventions, and in shaping applications before the Court of Protection and under the High Court's inherent jurisdiction. It argues that meaningful person-centred practice requires critical reflection of the exercise of power when balancing risk, protection and individual choice.

Keywords: adult social care; Mental Capacity Act 2005; Care Act 2014; Court of Protection; inherent jurisdiction; safeguarding; autonomy; deprivation of liberty; fluctuating capacity; local authority lawyers.

[A] INTRODUCTION

The Mental Capacity Act (MCA) 2005 and the Care Act (CA) 2014 provide the principal frameworks through which autonomy and protection are balanced in adult social care. Both statutes seek to promote individual choice whilst ensuring that adults who are vulnerable to abuse, neglect or exploitation receive appropriate support and protection from harm. In practice, however, the distinction between enabling autonomy and exercising control is rarely straightforward. Lawyers advising local authorities are frequently required to navigate situations involving

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fluctuating capacity, coercive relationships, safeguarding concerns and significant risks to welfare – often all at once. The legal principles may be well established, but their application requires difficult judgements about when intervention is justified and when a person's wishes should prevail despite obvious concern.

Rather than presenting autonomy and control as opposing concepts, this discussion focuses on the often fine and fact-sensitive boundary between enabling choice, responding to risk, and addressing potential coercion. It examines how that boundary is navigated in practice and how it shapes the day-to-day lives of those subject to adult social care interventions. Autonomy is not exercised in isolation, but within relationships of care, dependency, influence and professional authority, which legal intervention may support, constrain or reconfigure.

This discussion begins by examining the statutory frameworks governing autonomy and protection, and the ways in which fluctuating capacity, executive dysfunction, and coercive conduct complicate their application. It then considers the Court of Protection (CoP) and the inherent jurisdiction as mechanisms through which protective intervention is scrutinized and, where appropriate, authorized. Building on this, it explores the role of the local authority lawyer as facilitator, gatekeeper, and regulator, before examining safeguarding and deprivation of liberty as practical examples of circumstances in which measures intended to protect vulnerable adults may risk becoming forms of control. Throughout, the note argues that the lawyer's role extends beyond determining what the law permits to critically evaluating whether intervention is supported by the evidence, responsive to the individual's circumstances, and justified as a necessary and proportionate response.

For ease of reference, the terms "lawyer" and "practitioner" are used interchangeably throughout this note, unless the context indicates otherwise. References to a "professional" are used as a collective term for adult social care professionals, including social workers and other practitioners involved in assessment, care planning and safeguarding. Similarly, references to a "person" or "individual" are used as neutral descriptors and may refer to adults with capacity, adults lacking capacity, or adults whose capacity is disputed, as dictated by the context under discussion.

[B] A FRAGILE BALANCE?

Section 1 of the MCA 2005[1] sets out the core statutory principles, including the presumption of capacity (section 1(2)), the right to make unwise decisions (section 1(4)), and the concept of least restrictive practice (section 1(6)). Capacity is determined by the two-stage test in sections 2 and 3 MCA 2005. As confirmed by the Supreme Court in *A Local Authority v JB* (2021), an inability to make a decision must be *causally connected* to an impairment of, or disturbance in the functioning of, the mind or brain. This provides an important safeguard against professional concern being readily translated into findings of incapacity.

Separately, the CA 2014 places clear duties on local authorities to promote wellbeing, prevent abuse and intervene where necessary.[2] This, together with the MCA 2005, aims to support individual adult choice while recognizing that protection may sometimes require intervention.[3]

The challenge lies in determining how the legal frameworks should be applied to the realities of people's lives. Decision-making is often shaped by a combination of internal and external factors. Practitioners must remain alert to the impact of fluctuating capacity and executive dysfunction, as well as undue influence, coercive control, dependency and self-neglect. The difficulty is often not whether a decision has been expressed, but whether it represents a genuinely autonomous choice. This was recognized by the Court of Appeal in *DL v A Local Authority* (2012), where the court held that even adults who possess mental capacity may nonetheless be prevented from making genuinely free decisions as a result of coercion, undue influence, or constraint exercised by others. The case concerned elderly parents whose decision-making was alleged to have been overborne by their son's controlling behaviour. In confirming that the High Court's inherent jurisdiction extends to such circumstances,[4] the Court of Appeal acknowledged that vulnerability may arise not only from a lack of capacity, but also from external pressures which constrain a person's ability to make decisions freely.

Further, section 2(1) MCA 2005 is clear that capacity is time and decision specific. Application of the MCA 2005 is therefore also challenging

1 Accompanied by the MCA 2005 Code of Practice.

2 Accompanied by the Care and Support Statutory Guidance.

3 Albeit most provisions of the MCA 2005 apply to persons aged 16 and over, the CA 2014 generally applies to adults aged 18 and over. However, local authorities also have duties to undertake transition assessments for children, and carers of children, where the child is likely to have needs for care and support after turning 18 (see, for example, section 58 CA 2014).

4 See more on the application of the inherent jurisdiction at section [C] below.

where an individual's decision-making ability fluctuates over time. This is particularly common in cases involving mental illness, acquired brain injury, dementia and certain neurological conditions. The statutory framework encourages professionals to maximize an individual's participation in decision-making wherever possible, recognizing that temporary incapacity should not automatically result in substitute decision-making, even where those decisions are made in their best interests pursuant to section 1(5) of the MCA 2005. For lawyers, fluctuating capacity raises practical questions not only about the assessment of capacity itself, but also about the appropriate legal framework. Practitioners must consider whether fluctuations can be accommodated through ordinary decision-making processes, whether a decision can reasonably be delayed until the individual is able to participate, or whether court proceedings are required, including whether an interim direction and/or order should be sought under section 48 MCA 2005 to deal with the situation in question.

Application of these principles was considered in *A Local Authority v PG & Ors* (2023), where the court rejected an anticipatory approach that would have required professionals to determine, in real time, whether P's capacity had increased or diminished on a particular day. Instead, the court adopted a longitudinal assessment of capacity, recognizing that P's decision-making fluctuated frequently and unpredictably and that requiring practitioners to wait for periods of apparent capacitous decision-making would be unworkable in practice. Therefore, the question is often not simply whether capacity fluctuates, but whether the pattern, frequency and predictability of those fluctuations create a practical need for judicial intervention. In a case in which one of us was instructed, despite clear evidence of fluctuating capacity, it was concluded that measures under section 48 MCA 2005 were neither necessary nor proportionate because the identified risks could and should be managed through existing care-planning and decision-making processes pending further assessment. The critical issue was not the existence of fluctuation itself, but whether it rendered the ordinary statutory framework insufficient to manage the risks presented.

Complicating matters further is the concept of executive dysfunction. Yana Suchy (2009) describes executive functioning as the collection of higher-order cognitive processes involved in planning, initiating, organizing, monitoring and regulating goal-directed behaviour. In other words, executive function enables an individual to plan and carry out decisions. An individual who is experiencing executive dysfunction may demonstrate an understanding of the relevant information and may be able to articulate a decision when asked. However, they might struggle

to translate the decision into action or to consistently implement choices in practice. For practitioners, this poses a difficult question about the distinction between a person's ability to make a decision, and their ability to execute it in practice, and consequently whether legal intervention is required.

The practical relevance of executive dysfunction was highlighted in *Warrington Borough Council v Y & Ors* (2023), where the CoP considered evidence that an individual who appeared capable during assessment nevertheless experienced significant real-world difficulties arising from "Dysexecutive Syndrome" and "the frontal lobe paradox". This case demonstrates the need for practitioners to consider not only whether a person can understand and articulate a decision, but also whether impairments affect their ability to implement that decision in their daily life. In these contexts, and in our experience, autonomy and protection do not sit as clear alternatives; they overlap, interact, and at times pull in different directions.

Generally, the operation of the MCA 2005 and the CA 2014 reaches into the minutiae of individuals' lives. Care planning and safeguarding processes often involve decisions about contact, residence, and support. These decisions can reshape relationships and the fundamental structure of people's lives, particularly where concerns about risk or coercion arise. The focus is therefore not only on whether a person can decide, but on the *conditions* in which those decisions are made. In many cases, the state acquires significant influence over matters that most adults would regard as deeply private. Pause and consider: how would you feel if others had the authority to decide how you live your life? Whom you see and speak to? Where you live? How your money is managed?

It is precisely because these interventions can reach so deeply into a person's private life that the lawyer's role should extend beyond scrutinizing whether the proposed intervention is legally permissible. The lawyer should also interrogate the way in which the problem itself has been framed: what is being characterized as a risk, by whom, and on the basis of whose account? Particular care is required to ensure that professional or institutional understandings of risk do not come to dominate simply because they are expressed in the language of safeguarding or protection. Equally important is whether sufficient weight has been given to the individual's own account of their circumstances, relationships, wishes and understanding of the risks they may choose to live with. Legal scrutiny in this context is therefore not simply concerned with the boundaries

of lawful state intervention, but with the assumptions and narratives through which the case for intervention has been constructed.

Based on our experience, the boundary between autonomy and control is neither fixed nor binary. Efforts to support autonomy may involve elements of control; just as protective interventions may limit aspects of individual choice. In practice, this does not create a clear divide, but a shifting, context-dependent balance. Professionals may need to consider whether practical support, prompting, monitoring or other proportionate safeguards can enable the person to exercise greater autonomy without unnecessarily displacing their choices. Conversely, an intervention intended to protect the individual may become overly restrictive if it does not respond to changes in their abilities, circumstances or wishes.

The result is an iterative process, requiring professionals to continually consider whether the support or restrictions in place remain necessary and proportionate, and whether a less restrictive approach could achieve the same protective purpose. For lawyers, the significance lies in recognizing that the existence of a legal power does not determine whether it should be exercised. Rather, legal advice requires continuing scrutiny of the evidence, the individual's circumstances, and whether intervention remains justified as those circumstances evolve.

[C] THE COURT OF PROTECTION AND THE INHERENT JURISDICTION

The CoP, established under Part 2 of the MCA 2005, possesses a wide jurisdiction to declare whether a person has or lacks capacity (section 15) and make decisions about a person's welfare, property, or affairs, including through the appointment of a deputy (section 16). For local authority lawyers, CoP proceedings may become necessary where disagreements about capacity, best interests, risk or restrictive interventions cannot be resolved through ordinary social care processes. The CoP, therefore, provides a judicial forum for determining some of the most difficult and ethically complex questions encountered in adult social care, including disputes about residence, care arrangements, contact, medical treatment and deprivation of liberty.

At the same time, the CoP performs a broader constitutional function. While it safeguards the rights of individuals who lack capacity, it also scrutinizes and, where lawful and necessary, authorizes the exercise of state power over profoundly personal aspects of a person's life. In this sense, the CoP is both a protector of individual rights and the institution

through which restrictions on autonomy may be legitimized. In reaching its decisions, the CoP must consider evidence relating to capacity, the statutory best interests framework, and, critically, the person's own wishes, feelings, beliefs and values pursuant to section 4(6) MCA 2005. The CoP's role is therefore not simply to determine what is safest, but to balance autonomy, dignity, welfare and protection within the limits imposed by law. As Lady Hale observed in *Aintree University Hospitals NHS Foundation Trust v James* (2013: paragraph 45), "[t]he purpose of the best interests test is to consider matters from the patient's point of view". The CoP provides independent scrutiny of proposed interventions and determines whether the exercise of power over a person who lacks capacity is lawful, necessary and proportionate.

Still, the balancing act between power and autonomy is not confined solely to individuals who lack capacity. The courts have increasingly recognized that adults with capacity may nevertheless be vulnerable to coercion, undue influence or other forms of constraint. As the CoP's jurisdiction is generally predicated upon an individual lacking capacity in relation to the relevant matter, the inherent jurisdiction of the High Court can operate as what Lord Donaldson MR famously described as the "great safety net" of the common law. This expression derives from *F v West Berkshire HA* (also known as *In re F (Mental Patient: Sterilisation)* (1990: page 13), a case concerning the proposed sterilization of an adult woman who lacked capacity to consent to the procedure. Although this case pre-dated the MCA 2005, its wider significance lies in the court's recognition of the inherent jurisdiction as a means of responding to circumstances in which protection was necessary, but no specific statutory jurisdiction provided the answer. In the modern context, that protective function remains relevant to vulnerable adults who retain capacity but whose ability to make genuinely autonomous decisions may be compromised by coercion, undue influence or the conduct of others. The inherent jurisdiction therefore occupies a difficult space between autonomy and protection: it provides a mechanism for judicial intervention where vulnerability cannot adequately be addressed through the MCA 2005 framework, while simultaneously raising the question of when protection itself becomes a form of control.

That tension also places particular responsibility on the lawyer who translates safeguarding concerns into the language of judicial intervention. The application presented to the court is not a neutral reproduction of the underlying circumstances: decisions about which facts to emphasize, how risks are characterized, and what alternatives to litigation are identified can materially shape the apparent necessity and

proportionality of intervention. A situation framed primarily in terms of danger, coercion and vulnerability may make protective orders appear inevitable, whereas closer attention to the adult's expressed wishes, the practical support available to facilitate autonomous decision-making, and less restrictive safeguarding measures may reveal a wider range of possible responses. The lawyer's task is therefore not simply to establish whether the inherent jurisdiction *can* be invoked, but critically to examine whether judicial control *should* be sought and, if so, in *what form*. This requires safeguarding concerns to be tested against the available evidence, the adult's autonomy and the feasibility of less restrictive alternatives. In this sense, the boundary between protection and control is shaped not only when the judge determines the application, but when the case for intervention is formulated and presented by the lawyer to the court. The lawyer's responsibility is therefore not exhausted by identifying a jurisdictional basis for intervention; it also requires critical evaluation of whether the evidence justifies invoking the court's powers at all, and whether the proposed response represents the least restrictive means of addressing the identified concern.

[D] THE LAWYER'S ROLE: FACILITATOR, GATEKEEPER, OR REGULATOR?

In our experience advising as local authority lawyers, the adult social care lawyer's role cannot be characterized as either neutral or purely facilitative. Legal advisers do more than interpret legislation; they influence how statutory powers are exercised, how risks are understood and, ultimately, advise whether intervention should be pursued. The task of the lawyer shifts between facilitating individual autonomy, acting as a gatekeeper to state intervention, and, at times, contributing to the structure of outcomes in a way that carries elements of regulation or control.

These different functions become clearer when the legal principles are translated into legal advice. Acting as a facilitator of autonomy requires more than simply identifying that an adult has expressed a particular wish. It involves ensuring that the individual's wishes, feelings, values and preferences are accurately identified and placed at the centre of the decision-making process; testing whether apparent concerns about the wisdom of a person's choices are being conflated with doubts about capacity; and asking what practicable support could enable the person to make, communicate or implement their own decision. In this sense, the lawyer can perform an important corrective function where professional

anxiety about risk might otherwise displace the statutory commitment to autonomy.

The lawyer's role as gatekeeper to state intervention is correspondingly exacting. Where intervention is proposed on the basis of incapacity, coercion, undue influence or vulnerability, the lawyer must scrutinize the evidential basis upon which those concepts are invoked. This may require testing the evidence of incapacity or coercion, identifying gaps or inconsistencies in professional assessments, asking whether less restrictive measures have genuinely been explored and examining whether the proposed application is necessary and proportionate to the risk identified. The question is therefore not simply whether a legal route to intervention is available, but whether recourse to that route can be justified in the circumstances of the individual case.

At the same time, legal advice is capable of doing more than constraining intervention. Once a lawyer advises on the form an application should take, the evidence required to support it, the orders that should be sought or the safeguards that might render a proposed course legally defensible without the need for judicial oversight, the lawyer begins to participate in shaping the intervention itself. The distinction between facilitating, gatekeeping and regulating is therefore not always clear-cut. The same lawyer may advise against intervention where an individual's autonomy can be appropriately supported, conclude at a later stage that the evidential threshold for intervention remains unmet, and subsequently assist in designing a lawful and proportionate response once intervention is justified.

This exposes a significant feature of adult social care legal practice. Principles such as autonomy, necessity, proportionality and least restriction do not operate only as abstract limits imposed by courts after an application has been made. They are mediated much earlier through legal advice. The lawyer's questions about capacity, evidence, alternatives, wishes and proportionality can affect whether a matter reaches court at all and, if it does, the form in which it reaches the court. Legal advice consequently occupies an important position between the exercise of professional judgement and the exercise of state power. The adult social care lawyer is neither simply an advocate for intervention nor a detached observer of it, but one of the actors through whom the boundary between legitimate protection and unjustified interference is negotiated in practice.

By way of practical example (as discussed in section [B] above), cases involving fluctuating capacity raise particular difficulties for practitioners. *A Local Authority v PG & Ors* (2023) illustrates the point. For lawyers,

identifying, and advising on, fluctuating capacity requires more than an understanding of the legal test. It requires scrutiny of whether assessments adequately capture the individual's presentation over time, whether professionals can realistically identify changes in capacity as they occur, and whether the relevant decision can safely be deferred. Those considerations may affect whether reliance on sections 5 and 6 of the MCA 2005 (see further analysis of these sections below) is sufficient, whether anticipatory declarations or other judicial intervention should be sought, or whether more restrictive measures, including deprivation of liberty authorizations, can be justified. This practical example reinforces the point made above that the lawyer acts simultaneously as facilitator, gatekeeper and regulator, mediating the boundary between individual choice and protective intervention.

Central to the practitioner's function is ensuring that the individual's voice is heard. Advocacy and representation play a critical role within both safeguarding and the CoP. Individuals who are subject to deprivation of liberty authorizations are entitled to a representative pursuant to Schedule A1 to the MCA 2005, which requires the appointment of a Relevant Person's Representative to support and represent the person subject to the authorization.[5] As Lady Hale emphasized in *P v Cheshire West and Chester Council* (*Cheshire West*) (2014: paragraph 1), "human rights are for everyone, including the most disabled members of our community, and … those rights include the same right to liberty as has everyone else". Representation therefore serves not merely as a procedural formality, but as an important safeguard against protective interventions becoming unjustified exercises of control.

Independent advocates, litigation friends and accredited legal representatives frequently provide the primary means through which the individual's perspective is communicated to decision makers. For local government lawyers, these views are not simply procedural requirements to be recorded and filed away; instead, they form an essential evidence base against which proposed interventions must be assessed. In this respect, lawyers are not merely advising on what the law permits; they are required to engage with what the individual wants and whether the state's proposed response is truly justified.

The statutory scheme recognizes that promoting welfare may sometimes require the exercise of control. Sections 5 and 6 MCA 2005 provide legal protection for those who carry out acts in connection with

[5] Specifically, Mental Capacity Act 2005, Schedule A1, Part 10 (appointment and functions of the Relevant Person's Representative).

the care or treatment of an individual who lacks capacity, including, in limited circumstances, the use of restraint where it is "necessary" and "proportionate" to prevent harm. This highlights the responsibility on lawyers to ensure that an individual's wishes and feelings are not submerged beneath assessments of risk and best interests, and brings into sharper focus the point at which protective intervention may itself become a form of control.

[E] WHEN PROTECTION BECOMES CONTROL

The courts have consistently emphasized that practitioners must not let concerns about a person's welfare override a proper assessment of their mental capacity—often expressed as not allowing "the tail of welfare to wag the dog of capacity" (*Heart of England NHS Foundation Trust v JB* (2014: paragraph 7). This reflects the fundamental principle that individuals have the right to make decisions that others may regard as unwise. Under the MCA 2005, practitioners are legally required to begin with the presumption that a person has capacity and to respect their right to make unwise decisions, even where those decisions may expose them to significant risk of harm as enshrined by sections 1(2) and (4).

Safeguarding intervention is often prompted by circumstances that would cause concern to professionals. However, the existence of risk, vulnerability or professional concern does not, without more, justify intervention that overrides an individual's wishes. The MCA 2005 deliberately prioritizes decision-making rights even where the outcome appears objectively poor, provided the individual possesses the relevant capacity. The challenge for practitioners is therefore not simply identifying risk, but distinguishing between situations that require protective intervention and those in which respect for autonomy demands acceptance of a decision with which they fundamentally disagree.

For example, an adult may repeatedly express a wish to remain in a relationship or living arrangement that professionals regard as harmful. The lawyer's task is not simply to accept or reject allegations of coercive control, but to scrutinize the evidential basis for them. As illustrated by *DL v A Local Authority* (2012) (see section [B] above), the central question is whether the individual's apparent decision reflects a genuinely autonomous choice or one that has been undermined by external pressure. In *DL*, the parents were capable of expressing decisions and, on the assumed facts, satisfied the MCA 2005 capacity test. The concern was whether those decisions were truly their own, or whether they had been shaped by their son's controlling behaviour. This requires careful

analysis of the person's wishes and feelings, the consistency of their decision-making, and the evidence said to demonstrate coercion, rather than an assumption that an unwise or risky decision is necessarily a constrained one. In a case in which one of us was instructed, an adult repeatedly reported to professionals that she was at risk from her husband but refused to leave the relationship. Legal advice focused initially on creating a safe opportunity for her to engage with professionals away from his influence. Only then could a properly informed decision be made as to whether she wished to accept support and whether any application under the inherent jurisdiction was necessary or justified.

Section 42 of the CA 2014 places a duty on local authorities to "make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case … and, if so, what and by whom". This applies where a local authority has:

> reasonable cause to suspect that an adult in its area … has needs for care and support, … is experiencing, or is at risk of, abuse or neglect [whether by a third party or self-neglect], and as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.

Section 42 therefore reflects the state's responsibility to identify and respond to safeguarding concerns. Whilst local authorities are required to make enquiries where statutory criteria are met, safeguarding is not intended to operate as a vehicle for paternalistic intervention. The principles underpinning "Making Safeguarding Personal"[6] emphasize that safeguarding should be undertaken *with*, rather than *to*, the individual concerned. In doing so, the initiative challenges professionals to move beyond a purely risk-focused approach and to engage meaningfully with the person's own understanding of risk, safety and wellbeing. This can be difficult where an individual's expressed wishes conflict with professional assessments of what is safe or desirable, but it reflects the broader principle that protection should not automatically displace autonomy.

For the lawyer advising in this context, the key task is therefore to distinguish between a safeguarding concern that properly calls for protective intervention, and professional anxiety about a person's choices or exposure to risk. Before supporting intervention, the lawyer should test whether there is evidence that the person is unable to make the relevant decision, or that their choices are affected by coercion, undue

[6] "Making Safeguarding Personal" is an approach to adult safeguarding developed by the Local Government Association and the Association of Directors of Adult Social Services which promotes person-centred, outcomes-focused safeguarding practice and emphasizes the participation of adults in decisions affecting them.

influence or some other constraint on their ability to act freely, rather than assuming that an unwise or risky decision itself justifies intervention. The person's own wishes, values and desired outcomes must be properly identified and taken seriously, including what they themselves regard as an acceptable level of risk. The lawyer should also ask whether practical or less restrictive measures could address the safeguarding concern while preserving the person's autonomy. Ultimately, any proposed intervention should have a clear legal basis, pursue an identified safeguarding purpose and be necessary and proportionate to the risk identified. In this way, the lawyer's role is not simply to facilitate action in response to risk, but to ensure that safeguarding remains genuinely protective without becoming unnecessarily paternalistic.

[F] THE UK SUPREME COURT AND DEPRIVATION OF LIBERTY

Few areas demonstrate the tension between autonomy and protection more sharply than deprivation of liberty. The legal concept derives from Article 5 of the European Convention on Human Rights (ECHR), which guarantees everyone the qualified "right to liberty and security … in accordance with a procedure prescribed by law". At its core, deprivation of liberty concerns a person being confined to a particular place and unable to freely leave it. The European Court of Human Rights outlines three elements for deprivation of liberty: objective confinement in a particular restricted place for a material period of time, an absence of valid consent to that confinement, and attribution of responsibility to the state (*Storck v Germany* 2005: paragraphs 74, 89; Series 2020: 196). In the context of adult social care, this concerns individuals whose daily life is controlled to such a degree as to require authorization and oversight.

Section 64(5) MCA 2005 expressly links the concept of deprivation of liberty to Article 5, providing that references to a deprivation of liberty within the MCA 2005 have the same meaning as under the ECHR. The consequence is that, where care arrangements amount to a deprivation of liberty within the meaning of the law, it is ultimately a question of human rights, informed by domestic and Strasbourg jurisprudence.

For over a decade, the legal landscape in England and Wales was dominated by the Supreme Court's decision in *Cheshire West* (2014), with Lady Hale's now famous proposition that "a gilded cage is still a cage" (paragraph 46). This phrase captured a fundamental principle: the quality, purpose or benevolence does not determine whether a person's liberty has been restricted. A placement may be safe, comfortable and

unquestionably motivated by concern for an individual's welfare yet still constitute a deprivation of their liberty if they are subject to continuous supervision and control, and not free to leave—the so-called "acid test". In many respects, the judgment crystallized the central tension in adult social care law: the fact that protection and control are not opposing concepts, but often two sides of the same intervention. The challenge for practitioners is to recognize when measures intended to safeguard an individual cross the line from enabling autonomy to restricting it.

The judgment reinforced the principle that people who lack capacity are entitled to the same rights and procedural safeguards as those who do not. As set out in section [D] above, Lady Hale opened *Cheshire West* (2014) by stating that "human rights are for everyone". Nevertheless, critics questioned whether the acid test's focus on objective restrictions, rather than the individual's subjective experience, risked characterizing supportive care arrangements as forms of detention. Rosie Harding (2021), for example, notes the concern that the breadth of the test substantially expanded the reach of deprivation of liberty safeguards and brought many ordinary care arrangements within the scope of Article 5 scrutiny. The debate generated by *Cheshire West* (2014) therefore extended beyond the technical definition of deprivation of liberty and raised broader questions about dignity, autonomy and the extent to which the state should scrutinize arrangements made for those who lack capacity.

In June 2026, the Supreme Court fundamentally altered the legal landscape once more by handing down a complete reversal of the position via its judgment in the case of *A Reference by the Attorney General for Northern Ireland of a Devolution Issue under Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998* (*AGNI*) (2026). Overruling *Cheshire West* (2014), the court rejected the notion that deprivation of liberty can be identified through a single universal test and instead focused on a multifactorial approach which looks at the individual's "concrete situation". Particular significance is to be attached to the individual's wishes and feelings, with the court recognizing that a person who lacks capacity to make decisions about their care arrangements may nevertheless be capable of expressing valid consent, for the purposes of Article 5 ECHR, to the circumstances in which they live. The judgment therefore reframes the relationship between protection and autonomy. Rather than assuming that extensive procedural safeguards are always required where restrictive arrangements exist, the court emphasized the importance of understanding how those arrangements are actually *experienced* by the individual concerned. For lawyers advising local authorities and appearing before the CoP, the challenge is no longer simply

to identify restrictions, but to assess whether intervention designed to protect vulnerable adults risks imposing a degree of state oversight that the individual themselves neither seeks nor experiences as a deprivation of liberty.

AGNI (2026) provides greater clarity regarding the role of consent and subjective experience in the deprivation of liberty analysis, but it leaves many difficult questions unanswered. How much understanding is enough? When does acceptance become consent? What happens when capacity fluctuates? Where executive dysfunction is a relevant consideration, what if a person verbally expresses their consent, but their behaviour says otherwise? The decision overturns reliance on the concrete thresholds set out by the acid test, but in doing so places even greater emphasis on the importance of professional judgement. For local authority lawyers, that shift is potentially both autonomy-enhancing and problematic. On one view, it requires a more genuinely person-centred analysis. The question is not simply whether particular features of an arrangement can objectively be identified, but what those arrangements mean for this particular person, including how they understand, experience and express their wishes about them. Lawyers advising local authorities will therefore need to interrogate the evidence behind an assessment rather than simply testing the facts against a familiar legal formula. That means examining not only what the person says, but the context in which it is said, the consistency of their wishes over time, any relevant difficulties with executive functioning or communication, and the extent to which apparent agreement reflects a meaningful exercise of autonomy.

Yet, the same shift creates a corresponding risk. The greater the emphasis placed upon an evaluative assessment of the person's concrete situation, the greater the scope for differences in professional judgement. There is a danger that ostensibly person-centred reasoning may become paternalistic reasoning by another name, particularly where professionals conclude that the person's conduct should be afforded greater weight than their expressed wishes. The practical challenge for local authorities is therefore not simply to exercise judgement, but to make that judgement transparent and capable of scrutiny.

In short, the acid test may be a thing of the past, but the plight of the adult social care lawyer, and professionals tasked with assessing the situation on the ground, remains.

[G] CONCLUSION

The central challenge of adult social care law is not choosing between autonomy and protection, but determining how both can be respected simultaneously. In practice, that task frequently falls to lawyers advising local authorities, social workers, and the courts. The lawyer enables choice where the legal framework is used to give proper effect to the adult's wishes, feelings and values, and where intervention does not extend beyond what the evidence justifies. Conversely, the lawyer risks exercising or facilitating control where concerns about vulnerability, risk or welfare are allowed to displace the individual's voice, where assumptions are substituted for evidence, or where restrictive intervention becomes the default rather than a properly justified response. The discussion in this note demonstrates that the lawyer may occupy both roles: facilitator of autonomy and participant in the exercise of power. The distinction depends not on the legal framework itself, but on how it is applied.

Responsible legal practice requires more than identifying a lawful route to intervention. It requires rigorous scrutiny of the evidence, meaningful engagement with the individual's wishes, values and relational circumstances, careful consideration of less restrictive alternatives, and continuing attention to necessity and proportionality. These principles should operate not merely as standards applied by the court following an application, but as disciplines shaping legal advice from the outset. The lawyer's role is therefore not simply to determine how proposed intervention can be lawfully achieved, but to question whether it should occur at all. It is through that discipline of scrutiny and justification that lawyers can help ensure that legal protection remains a safeguard against harm, rather than a mechanism through which protection unnecessarily becomes control.

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Reflections of a Mediator on Inheritance Mediation: Are Family Inheritance Mediators Receiving Appropriate Training and Adequate Practice Support?

Andrew Sims

Abstract

Mediating family inheritance disputes is challenging. It places considerable technical demands on the mediator, combined with the additional emotional and psychological strain of mediating with grieving families. Often mediators are addressing the dispute itself and the underlying family conflict. Practitioners in this specialist field need appropriate training and adequate support to enable them to mediate effectively and safely. Drawing upon their own experience as mediator, the author reflects on what this should encompass.

[A] INTRODUCTION

The act of inheritance—how one generation passes on to another whatever it leaves behind, be it possessions, property, or wealth—affects all families to some degree. It has the potential to bring them together or drive them apart. Too often, it is the latter.

There is something profoundly tragic about a dispute over an inheritance. For family members who are having to cope with a bereavement, it can be a traumatic experience. They are often at their most vulnerable and communication within the family is at its lowest ebb. Families can find themselves unwittingly swept along in an endless cycle of escalation, seemingly unable to exert any control. What were once strong family bonds are weakened leading to the demonization and even estrangement of a family member.

Sadly, there has been a sharp rise in the number of these disputes going to court.[1] Since most settle before trial, these latest figures represent the tip of the iceberg. This trend is set to continue over the coming decades as the Great Wealth Transfer takes place, the historic shift of trillions of pounds in assets from older generations, mostly "baby boomers", to

[1] *Financial Times* (2026: 3) reported that 1200 probate claims were filed at the High Court in 2025.

younger generations, including “millennials” and “gen Z”. This shift is being driven by demographic changes, longer life expectancy and the significant wealth accumulated by older generations.

The family inheritance process is a hazardous one, with many pitfalls. It involves juggling priorities and making difficult decisions. These are well-meaning acts that can easily have unwanted consequences and far too many family members have their own harrowing stories to tell of family division or destruction arising from an inheritance.

This note draws upon the author’s experience as mediator and is the first step of a longer, ongoing, project on inheritance mediation that the author is undertaking.

[B] FAMILY INHERITANCE MEDIATION

Family inheritance mediation is an emerging specialist field, and it is growing. It overlaps with other areas, including elder, succession and intergenerational mediation, but has many distinctive characteristics that set it apart. For such an important field, it is largely unrecognized across the mediation community, let alone the wider public.

Practitioners who mediate regularly in this field will know how well-suited mediation is for these seemingly intractable cases. They will also be acutely aware of how demanding these cases are. Notwithstanding complex legal, commercial and tax considerations, what makes these disputes so corrosive are the years of suppressed emotion that often come to the surface, combined with the powerful and unpredictable impact of grief on family members and on the dispute itself. When an agreement on a way forward is reached through mediation, this can be transformative for the family and immensely rewarding for the mediator. But to what extent are mediators giving the participants—mostly family members—the best chance to help resolve and prevent these disputes and, where appropriate, to help them address the underlying conflict.

The practice of family inheritance mediation in England and Wales is fragmented. Anecdotal evidence suggests there are only a handful of mediators in full-time practice. Most come from a commercial or a family mediation background. A few are dual trained. Many differing mediation approaches and models are currently being used. It has, so far, suffered from a lack of coordination as it has fallen between two regulatory bodies, the Civil Mediation Council and the Family Mediation Council. To date, there has been a notable lack of research in this area and there is little sense of what constitutes best practice. Currently, there are no specialist

training courses available to mediators practising, or wishing to practise, in this field. This raises the question of the extent to which mediators are fully equipped to take on these cases, and what additional support and guidance might be needed.

[C] SPECIALIST TRAINING

Specialist training could be structured around four modules: ensuring an appreciation of the legal framework; acquiring a contextual knowledge of the various kinds of family inheritance disputes that can be mediated; gaining a working knowledge of family dynamics, high emotion and the psychology of grief; and providing a clear understanding of how to take full advantage of mediation's inherent flexibility by configuring the process to best meet the needs of the participants.

A specialist training programme should be available to experienced mediators who have completed their accredited foundation training. As the field develops, this training could be linked to a specific code of practice, or set of professional standards for family inheritance mediation.

The legal framework

The Inheritance (Provision for Family and Dependants) Act 1975 is arguably the most common basis for inheritance claims and mediators practising in this field will need to be familiar with eligibility and the concept of reasonable financial provision.

Family members often disagree on whether a will is valid, and mediators should be aware of concepts such as testamentary capacity, undue influence, ensuring the testator understood and approved the contents of the will, and basic legal requirements under the Wills Act 1837, such as proper witnessing and signing.

Since many disputes arise during the process of handling the estate, mediators would benefit from a working knowledge of probate and trust administration, including executor/trustee duties and intestacy rules, and have an appreciation of how disagreements over the value of a property or business interests and any inheritance tax and capital gains tax implications can impact any settlement options.

Finally, practitioners mediating in this field should be expected to have a practical understanding of the court's approach to mediation, including the Civil Procedure Rules.

Contextual knowledge of family inheritance disputes

A contextual knowledge of these kinds of disputes would be beneficial. This module could start with an exploration of the scope of family inheritance mediation. In addition to disputes relating to probate, wills, trusts, and the division of family possessions, there has been a sharp increase in disputes in other areas such as "gifting". This is a form of early inheritance, where the person making the gift is still living. Examples could include a deposit for a first mortgage, or money towards a new business.

This module could also explore some common examples of dilemmas and conundrums facing families during the family inheritance process, including difficult situations that can arise, and what triggers them. Examples could include scenarios where one sibling is the primary carer and how this can be best acknowledged; money or heirlooms that have been lent or gifted to a child through a verbal assurance, where nothing was ever formalized; and situations where there may be intergenerational differences. Some elderly parents assume that others think about money or possessions in the same way as they do and yet the reality is that there are likely to be different perspectives between family members. For example, where more children are living at home for longer, or receiving support with further education from parents.

Mediators practising in this field should have an awareness of the changes in family structures in the England and Wales over the last decade. The rate of divorce and remarriage has consistently risen, and more people are entering a new marriage or living with children from previous relationships. Many families in this jurisdiction have become more fractured and dispersed. Family units are less cohesive and, consequently, family members are less understanding and supportive of each other. Families are communicating remotely and spending less time together in person. When conflicts do arise, families do not necessarily have the communication channels in place to deal with issues, which can swiftly escalate.[2]

Mediators in this field would benefit from a basic understanding of dementia, age-related issues and how to assess, manage and accommodate capacity. This should include a familiarity with elder abuse and financial abuse, both little known about, but widely reported to be on the increase.

Being able to represent the voice, views and presence of the deceased in the mediation room, or around the screen, is essential. Training should

[2] According to Holly Mieville-Hawkins of Anthony Gold Solicitors in the Society of Trust and Estate Practitioners' STEP Barometer 2026 (at 9).

include various techniques to achieve this, such as a vacant chair, a photograph, or a symbolic possession. Mediators should also consider asking other family members about their knowledge and experience of the deceased, to gain a rounded impression of them. If negotiations are stuck during the mediation, it can sometimes be helpful for the mediator to consider asking the family members what, in their view, the deceased would have wanted, or was trying to achieve.

A defining characteristic of family inheritance disputes is the need for fairness and "justice" when it comes to the division of the estate. There is often a tension between distributing assets based on need versus equality. Specialist training should focus on how best to explore with family members their own individual views of what seems fair. Mediation can be used to facilitate discussions within the family regarding different perceptions of equality, entitlement and favouritism so that these are aired, acknowledged, explored and understood by other family members.

Training could also encompass an exploration of the various referral routes which exist to bring a case to mediation. Currently, referrals tend to come from the courts, solicitors or through mediation panels and only occasionally direct from families because, when people first get into dispute, many are not aware that mediation is available. Other possible referral routes include general practitioner services, bereavement services, accountants, and Citizens Advice.

Death and money are taboo subjects within many families but avoiding discussions on these subjects can create uncertainty, misunderstandings and disagreements later. The training should have a significant focus on the vital role mediators have to play in helping family members to have open and honest conversations about intentions, timing, and the reasons behind their decisions, as this can allow any concerns from family members to be explored and can help manage expectations.

Currently, mediators tend to be brought in too late in the process, often after a period of litigation, and spend time trying to de-escalate the conflict. The training should help mediators to explore new avenues for offering help to families at early stages of planning for the future, to ensure rifts do not appear later, for example, in highly complex, high-value cases: developing a "project mediation" model over a longer period, where appropriate; engaging a mediator to help siblings determine how best to approach family inheritance discussions; or working with a testator to reality test any potentially difficult decisions they may have in mind.

Family dynamics, high emotion and the psychology of grief

Inheritance disputes rarely stem purely from the money. They are often fuelled by historic family roles, long-standing resentments and grief. Mediators will need to engage with these personal and emotional aspects that offer the opportunity to address not merely the dispute, but the conflict that underlies it.

These are essentially family disputes, in which family relations are fundamental. Their impact reverberates across the wider family and can create further rifts which can persist for decades. To mediate in this area, a knowledge of conflict dynamics within the family is essential, as these disputes often originate from sibling rivalries, blended family dynamics or intergenerational and cultural tensions.

Most families will have some perception of rivalry, unkindness or pecking order. Mediators will need to be able to take time to understand the huge back-story and the long family history extending many years and identify and manage power imbalances within the family, for example involving an eldest sibling, or an estranged family member. Mediators working in this field would also benefit from a familiarity with family life cycles and family systems theory.

For those who have not mediated in this area, family inheritance disputes are unlike any other. They are deeply personal in nature and the responses they elicit are visceral. They can easily become all-consuming for family members. One of the distinctive characteristics of these disputes is the presence of high emotion: betrayal, suspicion, demonization and revenge. Specialist training should explore ways to allow space in the mediation process for emotional expression, without letting this derail the mediation process. This could include how to safely discuss events that happened in the past, should the need arise.

Mediators should have a working knowledge of the nature and impact of bereavement, and training should also cover grief psychology and how it can affect decision making and risk tolerance. It is difficult to overestimate the profound and unpredictable impact of grief on family members. Every family member will express grief differently, through anger, aggression, denial or being withdrawn, and will be at different stages of the loss and grief cycle. Also, anticipatory grief over the imminent loss of a loved family member has all the emotions of grief but may not be legitimized. Being able to acknowledge and validate loss and grief and

to recognize that family members grieve in different ways is vital for all mediators practising in this field.

Mediation practice and the conduct of cases

A detailed knowledge of how to structure the mediation and how to use its flexibility to good advantage is essential. Family inheritance mediation demands a bespoke approach. Mediation models can accommodate complexity, nuance, entrenchment and strong emotion (all features of family inheritance disputes) provided they are configured appropriately. A training programme should equip mediators with the necessary process design skills to ensure that the planning and organization of a mediation is tailored to the specific needs of the participants involved, the conflict at hand, and the desired outcomes, rather than following a one-size-fits-all formula.

There is a necessity in these cases to spend much more time on the preparatory phase of the mediation process. Building early rapport with family members is essential, as is ensuring that all the participants feel listened to, heard and understood.

Mediators working in this field should be familiar with techniques to consider when assessing the "emotional readiness to engage" amongst family members (Barlow & Ors 2017). They should be familiar with signposting participants in need of additional support, for example bereavement counselling or conflict coaching, before the mediation, if necessary, or in parallel with the mediation.

In terms of the mediation process, a training programme could underline the importance of careful planning of the physical, or online setting (or a combination of both) to ensure parties feel safe, maintain agency, and have a private space to retreat to and consult. It could also help with determining who needs to be at the table, or around the screen, including the option of a family member bringing in a partner or spouse to the mediation if they have decision-making influence, or bringing a friend or colleague for emotional support. These mediations will typically involve multiple parties, in addition to family members and partners, including lawyers, accountants, tax and property specialists.

The mediator will need to carefully plan the use of joint sessions, private caucuses, or "multi-track" meetings, with just the family being present, or including legal advisers. They will also need to consider the pacing of meetings (including one-day, or multiple shorter meetings) and allow time for reflection in between meetings. Mediators need to be mindful

of what is in the family's best interests, at all times. Training should consider the costs and benefits of using position statements at the start of a mediation.

A training programme should explore different models of mediation. Some form of hybrid or integrated mediation may be necessary to bring outside professionals into the mediation process. The training should explore what options are available and clarify the key differences between them. Different theoretical frameworks should be considered, for example Gary Friedman's 'Mediation through understanding' approach. Training could also explore when to consider using co-mediation.

Specialist training should help mediators to examine ways to tailor the outcome and shape solutions that address underlying needs, for example protecting long-term family relationships from further damage, or a re-integration of a family member into the family, following a period of estrangement. It could, for example, consider using a follow-up session after the mediation, to check the agreement is working and sustainable. This also provides an opportunity to help to restore communication, rebuild trust and, where reconciliation is not possible, help family members to co-exist without constant friction.

Regarding ongoing support for mediators, consideration should be given to adopting a professional practice consultant (PPC) model of supervision, as currently used by family mediators. Using this approach, the supervisor or PPC will act as a mentor and confidential sounding board, provide emotional support (where necessary), help to discuss and resolve any safeguarding or ethical dilemmas, and encourage mediators to engage in reflective practice.

[D] CONCLUSION

Family inheritance disputes are on the rise and continue to have a devastating impact on families. Valuable contributions to this distinctive and increasingly important area of practice are being made, but mediators and the mediation community have much more to contribute.

The complexity and intensity of these disputes mean that a more flexible approach is needed. To meet this challenge, further specialist training and other forms of support are recommended. It is hoped that this will provide mediators with the confidence they need to enrich their practice and to design and structure the mediation process in more creative and responsive ways, more attuned to the needs of family members and the

dispute at hand. This would undoubtedly encourage new mediators, who may previously have been hesitant, or felt unprepared, to enter this field.

Mediators are uniquely placed to become involved much earlier in the dispute life cycle. There are numerous opportunities to do so, through new referral routes, or direct referrals from family members.

This represents an opportunity to unite the mediation community. Mediators from different backgrounds and regulatory bodies should come together and work together. Practitioners should embrace their differences and see them as learning opportunities. Best practice can then be jointly developed by sharing expertise, pooling knowledge and resources and by conducting further research. With all the above in place, family inheritance mediators can feel emboldened to take on these demanding cases. In doing so, they will take further steps towards realizing mediation's full potential.

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Sir Henry Brooke Lecture 2026: The Twenty-First Century Judge— Privileges, Pitfalls and Potential

The Rt Hon Lady Wise*
President of the Scottish Tribunals and Inner House, Judge of the Supreme Court of Scotland

[A] INTRODUCTION

While I wasn't fortunate enough to meet Sir Henry Brooke during his lifetime, I have become quite well acquainted with him recently through what he called his "blogsite",[1] begun as an experiment to post his extra-judicial writings. Between its incipience in October 2015 and the last post in January 2018, the month of his death, the blog was an impressive repository for Sir Henry's views on many pressing justice issues, so much so that he was described by the then Chair of the Criminal Bar Association of England and Wales as "the doyen of legal bloggers". His farsighted commentaries on contemporary legal issues have inspired, at least in part, the topic of my lecture. Contributing to legal discourse in such a contemporary way could identify Sir Henry as the very paradigm of a twenty-first century judge.

We can, I hope, all concur with the view expressed by Lord Radcliffe, who in 1968 described the essential ingredients of the twentieth century judge as one who was "wise, learned and objective". One might regard those as prerequisites for holding judicial office, but are they sufficient in the twenty-first century and will any of those attributes still have value in the twenty-second century? Axiomatically, we live in an age of uncertainty. To what extent does the judiciary's role provide certainty and consistency in unstable times? Do threats to judicial security threaten democracy itself? What can the judges do to avoid such threats? Could judges do more to inspire the public's confidence about their decision making? What lessons can we learn from mistakes of the past?

It may now be regarded as mundane to note that privilege, or the exercise of power, necessarily imposes responsibility, but the adage has

* Lecture given on 9 July 2026 at Herbert Smith Freehills Kramer, LLP, Exchange House, Primrose Street, London.

1 See 'Henry Brook: Musings, Memories and Miscellanea'.

never been more applicable to the role of a judge than currently. While the substantive duties of the twenty-first century judge are court and subject matter dependent, the pre-eminent requirements of independence and impartiality remain essential components of the judiciary's role in upholding the rule of law.

Independence in individual judicial decision making may now be regarded as a subset of the overriding doctrine of the separation of powers. Judicial independence from executive power has a long and proud history throughout the United Kingdom (UK) and its constituent (including former) parts. For Scots, an important early illustration is provided by the case of *Bruce v Hamilton* in 1599, when King James VI of Scotland intervened in person in the debate on behalf of one of the parties. George Nicolson, Elizabeth Tudor's agent in Scotland, reported the court's response to his master, Cecil, in London, in this way:

> The Lord of Newbottle then also stood up and said to the King that it was said in the town to His slander and theirs, that they durst not do justice but as the King commanded them; which he said should be seen to the contrary, for they would vote against Him in the right in his own presence.

The Lords then so voted:

> Whereat the King raged marvellously and is in great anger with the Lords of Session—The King swears he will have Mr Robert Bruce's case reversed, which the President understanding, says he will pen in Latin, French and Greek to be sent to all the judges of the world to be approved, and that by his vote it shall never be reversed (Smith 1961: 72).

Sir William Coke displayed the same fearless judicial independence for England and Wales in 1610, when as Chief Justice he declared the King to be subject to the law, famously stating in Dr Bonham's case that the laws of Parliament would be void if they violated "common right and reason" (*Thomas Bonham v College of Physician* 1610). Much debated as a possible early example of judicial overreach, of course, but for present purposes another powerful illustration of the strength of the judiciary's determination to decide cases without fear or favour.

Moving forward a few hundred years to the twentieth century, an intense political history set the scene for the Supreme Court of Ireland's historic declaration in 1950 that key provisions of an Act of the Oireachtas, the Sinn Féin Funds Act 1947, were unconstitutional. An engaging article by Gerard Hogan SC (now Justice of the Supreme Court of Ireland) marking half a century since its conclusion brings the controversy to life vividly (Hogan 1999). When Sinn Féin had split following the peace

treaty of 1922 the original organization resolved, on the motion of its Vice President Michael Collins, to vest a substantial "struggle fund" donated by supporters, in its President, Éamon de Valera, as trustee. The original trustees of the money, who were pro-Treaty, subsequently refused to hand over the funds to the anti-Treaty faction. For 25 years a dispute, albeit unlitigated, brewed about the identity of the true successor to the original party and so the rightful owner of the funds, which had meantime been lodged in court by the survivors of the original trustees. It wasn't until proceedings were pending before the High Court for their recovery, albeit making halting progress, that a Bill was introduced (by De Valera as Taoiseach but now antagonistic towards the reconstituted Sinn Féin) and passed, providing that a new body would hold and administer the money. Strikingly, the legislation provided that the High Court would require to dismiss the pending *Sinn Féin Funds* case on the application of the Attorney General.

Such an application was duly made but refused by the President of the High Court. When Mr Aindrias Ó Caoimh[2] for the Attorney General claimed at the hearing to be at a loss as to the way in which the Act could be unconstitutional the President responded:

> Because judicial power is vested in the Courts. This is a judicial matter brought before the Courts for judicial determination. No other organ of the State, in my view, has the right to interfere pending that judicial determination … (quoted by Hogan 1999: 379).

The subsequent refusal of the Government's appeal to the Supreme Court was justifiably hailed in the Irish press as a triumph for the independence of the judiciary (*Buckley v Attorney General* 1950).

In the modern era, challenges to judicial independence are frequent and require appropriately robust responses. One current concern is the extent to which judges are pilloried by the media in relation to their decisions, most recently in what many regard as the extraordinary statement by Prince Harry and Baroness Lawrence about Nicklin J's judgment in their case (*Lawrence and Ors v Associated Newspapers Ltd* 2026). Strident criticism of any judicial decision is an acceptable aspect of the principle of open justice; public calls to discipline or remove judges for individual decisions is not. The recent sentencing decision referred to the Court of Appeal in relation to non-custodial sentences imposed on three 15-year-olds convicted of the rape of two girls illustrates the point. Putting to one side the merits of the decision, now of course partly overturned on Crown appeal (*R v X, Y, and Z* 2026), it is the signing by more than 200,000

[2] Later a judge of the Supreme Court of Ireland and of the CJEU.

people of a petition calling for mandatory sentencing reviews and powers to remove judges from office "that are actually used" which exemplifies the persistent level of public misunderstanding, marked by an increasing tendency to call for removal of a judge who may (or may not) have erred in making a judicial decision. The failure of the Crown Prosecution Service to correct errors in the colourful reporting of that case appears to have compounded the problem (ibid paragraphs 183-191).

Our Supreme Court has recently had occasion to reiterate that the constitutional principle of the judiciary's independence from government still rests on the separation of powers, enshrined now in statutes covering the constituent territorial jurisdictions of the UK. That crucial principle informed the apex court's decision that the relationship between a judge and government is fundamentally *not* akin to an employment relationship (*X v Lord Advocate* 2025: paragraphs 60-62).[3] In consequence, the individual concerned, found by a fitness for office tribunal to have been sexually harassed by the judicial office holder,[4] must now pursue her claim against him personally, risking his inability to satisfy an award. While understandably disappointing for that litigant, the consequences of treating judges as effectively employees of government would have been far more constitutionally unpalatable. The High Court of Australia reached a reassuringly similar conclusion when overturning the Federal Circuit Court's decision to allow a litigant to sue a judge for false imprisonment. Despite the lower court describing the judge's conduct giving rise to the proposed claim as "an affront to justice" in his reckless disregard for the litigant's rights, his behaviour could not expose him to a civil claim. As the High Court observed, judicial immunity does not exist for the benefit of individual judges; it serves the public interest in preserving the ability of an independent judiciary to act without fear or favour (*Commonwealth v Stradford* 2025).

[B] JUDICIAL APPOINTMENTS

In the realm of judicial appointments, independence from the executive is a relatively recent phenomenon in the UK. While each of the three territorial jurisdictions now has an established Judicial Appointments Board or Commission, their creation ended a long history of blurred lines. In Scotland, for example, the Lord Advocate, head of the prosecution service and a government law officer, customarily appointed himself to a

[3] The judge involved was a sheriff, a lower court judge in Scotland and the government was the Scottish Government.

[4] Sheriff John Brown fitness for judicial office: tribunal report.

senior judicial vacancy at the end of a term of office. As one judge, Lord Stott, is recorded as having quipped immodestly: "I appointed myself and a jolly good judge I turned out to be" (Paterson 2006: 33).

The metamorphic shift in attitudes to what is fair in judicial appointments since then is perhaps best illustrated by the Court of Appeal's decision last year supporting greater transparency in the information given to candidates for judicial office about those who will be consulted on their application (*R (on the Application of Katie Thomas) v Judicial Appointments Commission* 2025). A system that failed to make such candidates aware that consultees would be permitted to include comments (in that case adverse comments) they had received from "sub consultees" offended the statutory requirement to conduct the selection process fairly, albeit that the candidate had not established substantive unfairness in the rejection of her application. Judicial appointments, at least in the UK jurisdictions, are currently transparently free of the secret soundings and taps on the shoulder that the statutory regimes aim to consign to the sphere of historic interest. Complacency in this regard could yet be misplaced, however, as at least one political party in the UK appears to support the abolition of the Judicial Appointments Commission for England and Wales (Cross 2025).[5] Whether the consequence of that being enacted would be a return to direct political involvement in such appointments is unclear.

A marked increase in challenges to judicial independence from political interference in the judicial appointments arena has been experienced quite dramatically a little further from home. Since 1989 Poland has benefited from a National Council of the Judiciary (NCJ) tasked with safeguarding the independence of courts and judges. One of its functions is to assess and propose candidates for judicial office. Following parliamentary elections, a so-called "reform of the judiciary" was initiated in 2017 and implemented by successive amending laws. The key change involved the process of recruitment to the NCJ, previously through election of the candidates by their peers but under the amending law by parliamentary appointment, thus allowing Parliament to influence judicial appointments. Even prior to the changes, there had been an absence of protection against arbitrariness in the appointments system, with no provision for judicial review. One challenge exposed that the President of Poland had refused to appoint applicants to vacant judicial posts, despite their

[5] Such views were also expressed by Robert Jenrick while still a member of the Conservative Party (*Law Society Gazette* 2025).

having succeeded in a competitive selection process conducted by the NCJ (*Sobczynska v Poland* 2026).[6]

An early analysis of the proposed reforms by the Council of Europe's advisory body, the Venice Commission, concluded that they would:

> enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat … to … judicial independence as a key element of the rule of law (Venice Commission 2017: paragraph 129).

There followed a series of challenges to the new system, including to the European Court of Human Rights (ECtHR)[7] and the Court of Justice of the European Union (CJEU) *(European Commission v Poland (Independence of the Supreme Court)* 2019). The ECtHR concluded that the participation in judicial decision making of judges whose appointment was affected by the procedural deficiencies may violate the right to a fair trial under Article 6 European Convention on Human Rights (ECHR). In its new composition the NCJ was deemed to be no longer an independent and impartial body. Likewise, the CJEU found such regression to be in violation of EU law.

Efforts have been made to resolve some of the difficulties since the election of a new Polish Government in December 2023. It sought an urgent joint opinion from the Venice Commission the following year on a number of issues about the status of the judges appointed by the deficient appointment procedure and the validity of their decisions. The Commission expressed the view that, balancing the principle of legal certainty and the need to avoid jeopardizing the good functioning of the Polish judicial system, any right to reconsider such cases should be time limited and considered forfeited thereafter (Venice Commission 2024: 11). I suggest that the Polish example represents a stark reminder of the extreme disruption to the operation of the rule of law if judicial appointments cannot withstand scrutiny.

Whether to unpick (or not) the decisions of invalidly appointed judges has also arisen in the UK where a nuanced distinction has been drawn by the Court of Appeal between those in good faith or not about the invalidity of their appointment (*Baldock v Webster* 2004). Even the most sophisticated of statutory schemes can go awry. I conclude on this point that the aspiration of independence from government in judicial appointments deserves to be closely guarded.

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6 While the events were of some vintage, the decision of the First Section was pronounced only recently, on 21 May 2026.

7 See *inter alia*: *Grzęda v Poland* (2022); *Advance Pharma SP Z OO v Poland* (2022); *Dolińska-Ficek and Ozimek v Poland* (2021); *Reczkowicz v Poland* (2021).

[C] JUDICIAL CONDUCT

The twin natural justice maxims of *audi alteram partem* and *nemo iudex in causa sua* ought to underline everything judges do. But notwithstanding these ageless imperatives, the twenty-first century judge may find that notions of propriety have evolved over time. In particular, an arguably more stringent approach to judicial misconduct threatening impartiality is now taken. A Scottish authority from the turn of the millennium illustrates the pitfalls that can face even very experienced judges. The late Lord McCluskey attempted admirably (though bravely) to demystify the judiciary by writing a regular newspaper column. In one such contribution, he referred to the ECHR as "a field day for crackpots and … a gold mine for lawyers". Regrettably the publication came shortly after he had refused the appeal of some Dutch drug smugglers on ECHR grounds. An embarrassing second appeal followed, although the court emphasized that it was the judge's journalistic language rather than his substantive opinion that was problematic (*Hoekstra v HM Advocate (No 2)* 2000: 401).

In one of the most infamous twentieth century cases involving alleged bias on the part of the judiciary, a trial judge in England referred in his summing-up to a principal prosecution witness as "a fraud, a sponger, a whiner and a parasite", while describing the defendant politician as "a national figure with a very distinguished public record" (Waugh 1980: 217).[8] It seems unlikely that in the twenty-first century such remarks could be cured by the traditional reminder to the jury that it is their recollection alone of the evidence and on witnesses' credibility that matters. But regardless of the nature of perceived judicial misconduct, methods of addressing it are problematic.

Removals from judicial office through misconduct have been extremely rare. In 1992 a Scottish sheriff was so removed on the basis of inability not characterized as misbehaviour. The conclusion was that he suffered from an underlying defect in character, which manifested itself in various ways to the severe prejudice of his function as a judge. The fitness for office panel found that he was:

> completely unable … to confine his attention to the evidence which the parties to the case wish to lead. He carries with him on to the Bench a wealth of private knowledge culled from various sources, which he employs with no sense of self restraint whenever he likes to decide cases in his own way irrespective of issues which he has been asked to decide. His belief that his own expertise is superior to

[8] Quoting Cantley J in the trial of Jeremy Thorpe.

> that of the parties and their witnesses … makes it impossible for him to bring an open mind to bear on cases where he thinks he has a contribution to make (*Stewart v Secretary of State for Scotland* 1995: 899).

Most recent cases involving judicial misconduct thankfully fall far short in terms of remedy from the last resort of removal from office. Insofar as there is a trend, these have tended to involve alleged unreasonable or bullying behaviour that offends or at least may give the perception of offending against the requirement of impartiality. Judges who have failed to listen carefully to both sides, who interrupt so frequently or so inappropriately that their impartiality can be called into question damage the public perception of the judiciary and may even find their decisions vitiated through such conduct. The balance is a difficult one. It has been recognized that modern judges take a more interventionist approach than previously. As Baker LJ put it in one recent case, "No advocate enjoys addressing a judicial Sphinx" (*Re K and L (Children: Fairness of Hearing)* 2023: paragraph 64), albeit that the judge under scrutiny in that judgment was ultimately found to have "descended into the arena" in an unacceptable way. It seems to me that the type of hearing makes a difference; when evidence is being led judges should be far more circumspect in their interventions than during submissions by counsel (*CD v ND* 2025: paragraph 49).

So what is the remedy for a litigant where unfair judicial conduct has occurred? It is now established that the correctness of a subsequent judgment is insufficient to remedy such behaviour and render fair an unfair hearing; such a decision has been described as "written in water" (*Serafin v Malkiewicz* 2020: paragraph 49). The practice in England and Wales, if unfair conduct by the judge has so tainted the proceedings that the decision cannot stand, is to order a rehearing. Conversely in Scotland, where authority suggests that (in any context) the court has no such power, the practice is for the appellate court to decide the case of new itself (*MacLeod's Legal Representatives v Highland Health Board* 2016: paragraphs 158-160). Either way, judicial misconduct has the potential to damage not just the reputation of the judiciary but the delivery of effective justice. When judges exceed the limit of reasonable conduct such that an unfair process has ensued, there is no choice but to undertake the consequential unravelling of that process.

[D] THREATS TO JUDICIAL SECURITY

On 3 March 2023 two Scottish men were convicted of the assault and abduction of a sheriff, Robert McDonald, in Banff as part of a so-called "citizen's arrest", although it was death threats sent to former First Minister Nicola Sturgeon by one of them which grabbed the headlines (Barker 2023). In that and subsequent cases, such as the assault on a family judge in Milton Keynes, where individual criminal acts have been perpetrated against a judicial office holder, it is uncontroversial that they should be provided with the same legal protections as any other citizen. Less frequently articulated, but widely understood by lawyers, is the principle that an attack on a judge is an attack on the rule of law. But what if those attacks are to the life of the nation itself?

The war in Ukraine illustrates most poignantly that the judiciary can be directly affected by security threats to their jurisdiction. Having heard first hand from a Ukrainian judge who described working in a court where several of her judicial colleagues and officials left to fight for their country, became casualties of war and did not return, I approach this subject recognizing that such experiences are incomparable to those faced in the UK. The unimaginable daily challenges posed were eloquently summarized by Professor Dmitriy Kamensky, who wrote this early in the conflict:

> It is really a challenge to do any kind of legal writing when law itself, just like any other aspect of normal life that we take for granted, disappears. When a group of heavily armed troops comes out of the blue to search your car and the house you have fled to escape shelling in your home city (forget about any type of due process or basic rights protection). When a cruise missile strikes about a mile from your house one night with a loud banging sound. When your law school disappears, and most of your colleagues, students, and friends have escaped to other parts of the country or abroad, while your academic career track, with strong, over decade-long ties to American jurisprudence and the legal community, becomes more of a personal safety threat than a hard-earned achievement (2022: 541).

I imagine that few if any of us present have been required to consider just how much we would sacrifice to keep the justice system operative in such extreme circumstances.

In the twentieth century, judges faced the supreme challenges of world war and revolution. It is striking that the judges who are best remembered are those who refused to yield to wartime temptations of expediency or vengeance. Two examples merit consideration. The first is Atkin LJ's majestic, solitary dissent in *Liversidge v Anderson* refusing to accept

that the Secretary of State could deprive those considered to have hostile associations of their liberty without disclosing the reasons, declaring:

> In this country, amid the clash of arms, the laws are not silent … they speak the same language in war as in peace. … the judges … stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law (1942: 244).

The second is the principled stance of the French judge Léon Lyon Caen. As a Jew, he had been dismissed from the Cour de Cassation under Vichy's antisemitic laws and had lost three sons during the occupation. Nonetheless, when approached to preside over the treason trials of the Vichy leadership, Lyon Caen refused on the basis that he could not approach the task without bias, a decision demonstrating an almost unimaginable level of integrity (Jackson 2023: 114-115).

This legacy was reflected more recently in Wilkie J's sentencing remarks following the conviction of Jo Cox MP's murderer, who was described as having betrayed "the quintessence of our country".[9] That the judiciary charged with imposing punishment on those who threaten democracy may on occasions be victims of such conduct themselves has presented itself as one of the most acute dangers for the twenty-first judiciary.

[E] POTENTIAL—WHITHER THE ROLE OF JUDGES IN A WORLD OF AI?

Moving from the troubled past to, one hopes, a brighter future, it is hard to keep pace with the volume of contributions on the subject of artificial intelligence (AI) and the law. As recently as this morning a Franco-British Lawyers Society seminar entitled "Artificial Intelligence; Friend or Foe" took place in Edinburgh with contributions from distinguished French and English judges, one of countless though necessary discussions about the extent to which AI is transforming the way we work. There is no time this evening for more than a brief foray into one of the many pertinent questions in the ongoing AI debate, namely whether the distinctly human aspects of judging will survive this revolution. As one member of the Australian judiciary has observed, judges "are not reasoning machines" (*Hendry v State of Western Australia (No 3)* 2025). But for how much longer?

9 'R v Thomas Mair, Sentencing Remarks of Mr Justice Wilkie'. 23 November 2016.

Judge Richard Posner, formerly of the United States Court of Appeals for the Seventh Circuit, drilled down somewhat controversially into the *je ne sais quoi* of judging, albeit not in the context of AI, saying:

> I pay very little attention to legal rules, statutes, constitutional provisions. A case is just a dispute. The first thing you ask yourself – forget about the law – what is a sensible resolution of this dispute … When you have a Supreme Court case or something similar, they're often extremely easy to get around (Liptak 2017).

So, we might ask, is the nebulous but precious common sense the irreplaceable judicial commodity?

Posner's approach was radical and contradicted the accepted norms of decision making through strict legal analysis. One eminent academic concluded a review of Posner's book *Overcoming Law* by observing:

> I, for one, would cheerfully surrender custody over my fundamental rights and liberties to the supremely reasonable Richard Posner, but I am less inclined to give similar discretion to many of his judicial colleagues (Rosen 1995: 584-596).

And what of compassion? Could *it* be the key trait that survives machine-led thinking? Although "compassion", while a universal value, is not one which is without dispute. The line of authorities relating to the withdrawal of life-support demonstrates that point well. "Compassion" in that context may look different to a utilitarian, a consequentialist, a Catholic, a Muslim or a parent or some combination of those. What "compassion" means to different people and so to different judges will vary.

So much has been written about AI that it is hard to distil succinct thoughts from the plethora of sources. However, recent contributions, such as those of the outgoing Master of the Rolls, have focused on the aspects of judging that may yet be left to human beings (Vos 2026). A view that is gathering support in this context is that judges working in fields involving human interest may find themselves more in demand than ever. One such example is family law, particularly child protection.

There can be no higher stakes in judicial decision making than when judges require to resolve live practical questions between individuals or between the state and individuals. The enormity of the task was articulated persuasively by Nicholas Mostyn J, in a lecture "The Craft of Judging and Legal Reasoning":

> I have tried in child protection proceedings … cases where the issue is whether a parent has deliberately killed a child. In effect in such cases I have sat as a Diplock Court trying a charge of murder. In the light of such findings I have been asked to order, and have ordered,

> forced adoption severing the parental bond. In the Court of Protection I try issues of mental capacity and in the light of the findings have been asked to order, and have ordered, forcible caesareans or amputations. I have been asked to make findings as to the life expectancy and quality of life of seriously ill and damaged babies and adults in support of an application that medical care should be made palliative only and that the person should be allowed to die (Mostyn 2014: paragraph 4).

Transposing that to the current discussion, I find it hard to conceive of such decisions being made by reasoning machines.

When Lady Hale said that judges can and should be human and not alien creatures (2014) the context was not any feared or anticipated destination for AI, it was rather about the need for a judiciary representative of the public it serves. And while the sentiment that judges should have human compassion is a respectable one, the received wisdom is that they must be alert to the dangers of allowing considerations beyond the law to influence their decisions.

In a fascinating book entitled *How Judges Judge*, Brian Barry, an Irish academic, examines several thought-provoking topics on judicial decision making (2021). These include cognitive biases, errors in numerical evaluation, motivated reasoning, emotion and group decision-making effects; uncomfortable concepts for judges even to contemplate, schooled as we are in the fundamental ethos of impartial decision making. But let me pick just one example, that of the role of emotion in judicial decisions. Barry cites examples of judges making statements that appear to go against what he terms the "persistent cultural script" of judicial dispassion. First, there is the statement of an English family court judge who stated "I couldn't read out the judgment; I just had to hand it down in writing" to describe his emotion in a case involving a child being taken away from her young mother. The written judgment itself expressed his sadness and regret at coming to the "wretched" conclusion (his words) that the child should be so removed and anger at the care system that appeared to have let the mother down. And there is a story of a Canadian judge who was seen to dab a tear from her eye when reading a victim impact statement in a sexual abuse case and who was then asked to recuse herself. Refusing to do so she declared that "there is nothing wrong with the court showing emotion" and that demonstrating human compassion was not the same as judicial bias. Academic writers have attacked these and other examples as inappropriate, arguing that to call a judge emotional is "a stinging insult, signifying a failure of discipline impartiality and reason". This single example demonstrates the minefield that is the psychology of judicial decision making, a subject on which I

claim no expertise. Its relevance to the issue of potential for future judicial decision making may be to consider whether, properly channelled, the human aspects of judging may yet be our "USP".

It seems to me that taking care to discount personal bias should not deprive judges of empathy where appropriate, even at the highest level of decision making. In a short but impressive biography of the late Lord Rodger, the point is neatly articulated. Remarking on the sensitivity Lord Rodger displayed in his searching remarks about whether and how a tribunal could measure the suffering which a gay man would find reasonably tolerable in the case of *HJ (Iran) v Secretary of State for the Home Department* (2010), David Johnston KC records that this was a judge who brought innate human sympathy to his judicial work in addition to meticulous legal analysis (2015).

So, how will the twenty-second century judge navigate this quagmire? If reasoning by deduction, induction and analogy can all be performed perfectly well by AI, will it be the peculiarly human elements that will continue to justify our existence as decision makers? Discussions about these elements within judicial decision making are hardly novel; they pre-date the current explosion of contributions on judging and AI. In 1999, Michael Kirby the esteemed Australian jurist and academic, put it this way;

> Decision-making in any circumstance is a complex function combining logic and emotion, rational application of intelligence and reason, intuitive responses to experience, as well as physiological and psychological forces of which the decision-maker may only be partly aware (Kirby 1999: 21).

The discussions about replacing judges with AI bots are redolent in some ways of the debate that took place during the Covid-19 pandemic. The courts quickly adapted to online hearings, so that the business of judicial decision making could continue. In some quarters, Scotland being one, this was considered so successful that questions arose about whether the need for in-person hearings could be dispensed with in the longer term. Many of us felt that ignored the importance of the sense of place that courts and human judges provide when dispensing justice. In his ongoing work about courtroom movement, James Campbell at Oxford draws on legal architecture scholarship in describing the space that we call a courtroom as "the setting for a ballet previously choreographed but yet to be performed". Using Court 1 in the Court of Session in Edinburgh as the paradigm, Campbell examines the court's innovations such as the embracing of livestreaming its hearings. He comments that:

> this push for transparency through technology is admirable and may go some way towards demystifying the arcane. Alternatively, it may simply disseminate the arcane to a wider audience (2027 forthcoming).

Either way, it seems to me that if we jettison those publicly recognizable and well understood aspects of the art of judging we do so at our own peril and that of the as yet unborn twenty-second century judge.

Human impact hearings within public inquiries such as the Post Office and Infected Blood Inquiries are good examples of the aspects of judicial work that investigate much more than the rights and wrongs of a system or incident. They require a human face.

So, having made significant progress towards blending technology into the important physical space of the courtroom, just how looming is the threat that human judges won't be occupying it? We must be live to the extent to which AI might supplant judicial decision making as opposed to providing assistance with it. Returning to Barry, in concluding his work by examining the case for and against AI judges replacing the human kind in future, he acknowledges that such judges will be able to produce good quality judgments, more efficiently and accessibly than their current human counterparts. But this is balanced by the view that justice is not just a product, it is also a process. He states:

> Many litigants crave the sense that they have been listened to, that they have had their day in court and that they have participated in a civic exercise under the watchful eye of the public (Barry 2021: chapter 8).

That reflects, I suspect, the experience of most of those of us who have spent their professional lives in the courts.

There are recurring themes in considering the privileges, pitfalls and potential of and for the judiciary; as in so many walks of life we can learn from past mistakes. I want to conclude this survey of twenty-first century judging with an optimistic word directly to those of the century to come. To paraphrase the enduring words of Mark Twain, I am confident that rumours of your anticipated demise are being greatly exaggerated.[10]

Thank you for listening.[11]

[10] "Reports of my death have been greatly exaggerated", attributed to Mark Twain in the *New York Journal*, 2 June 1897.

[11] And my thanks to Andrew Ratter, Law Clerk to the Inner House of the Court of Session, for his assistance with some of the background research for this paper.

About the author

The Rt Hon Lady Wise (Morag Wise KC) *is a graduate of the University of Aberdeen (LLB Hons, LLD (Hon)) and of McGill University, Montreal (LLM). She qualified as a solicitor in 1989 and worked for an Edinburgh firm between 1987 and 1992, dealing in general civil litigation. She was called to the Bar in 1993 and practised in civil litigation, specializing in family law. In 2005 she became Queen's Counsel and from 2008 sat part -time as a Temporary Judge while still in practice. She was appointed as a Senator of the College of Justice (Supreme Courts of Scotland) in 2013 and sat as a Judge of the Employment Appeal Tribunal for three years until December 2018.*

Lady Wise served as one of the two Family Court judges in the Court of Session prior to her appointment to the Inner House in January 2022. She continues to chair the Family Law Committee of the Scottish Civil Justice Council and has been an International Hague Network Judge since 2017. Lady Wise has been President of the Scottish Tribunals since 1 May 2023. In 2025 she was appointed as an ad hoc judge of the European Court of Human Rights in Strasbourg. See also her profile page.

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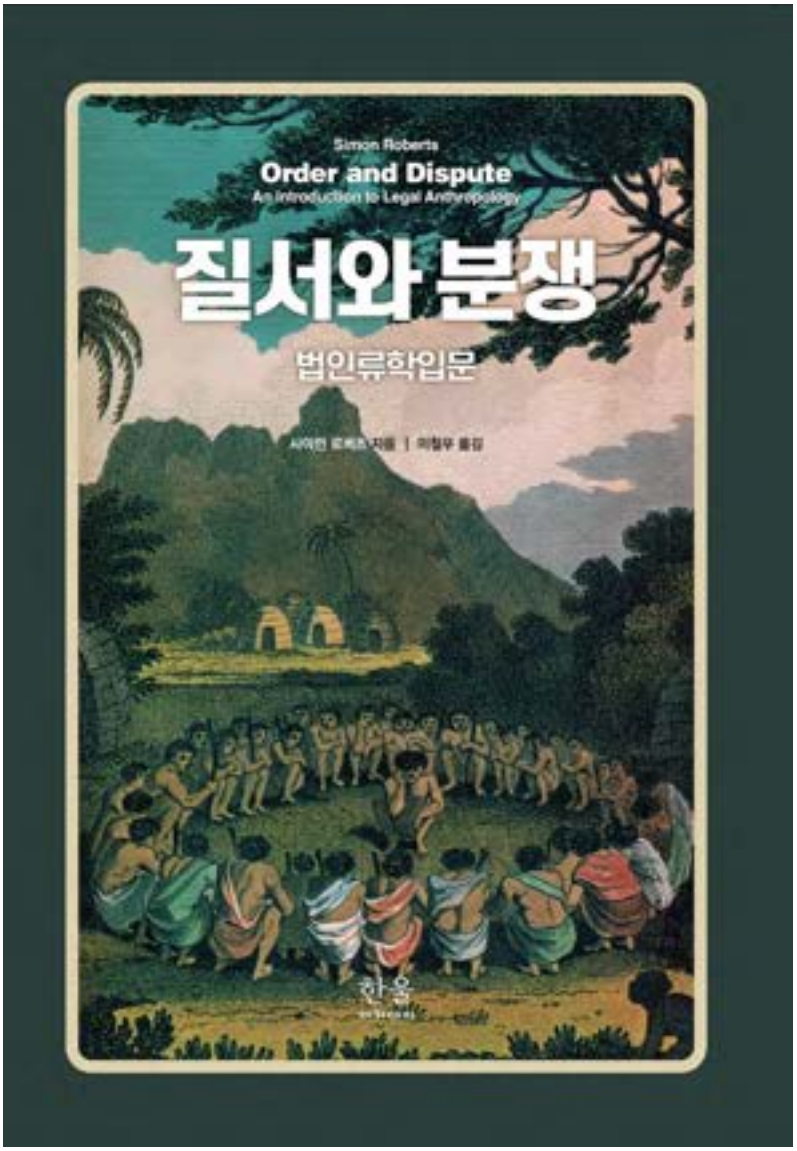
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In Celebration of the Work of Simon Roberts (1941-2014)

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Yonsei University

Marian Roberts
South East London Family Mediation Bureau; College of Mediators

Michael Palmer
SOAS & IALS, University of London; HKU & CUHK, Hong Kong



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[A] INTRODUCTION

The three short essays that follow celebrate the scholarship of Professor Simon Roberts (1941-2014), a distinguished scholar primarily in the field of legal anthropology, whose academic career was spent as a leading figure in the Law School at the London School of Economics and Political Science (LSE). In Simon's honour, Professor Chulwoo Lee has translated his seminal study, *Order and Dispute: An Introduction to Legal Anthropology* (1979; 2013a), into Korean, so that it might be more accessible to Korean legal and other scholars, and included here are his thoughts on the task of translating the study into Korean. The two accompanying essays are reproduced here also in celebration of Simon's work and will be included in the translated volume in Korean.

Chulwoo Lee was Simon's PhD student at the LSE and, after graduating, remained a lifelong friend; his "Translator's Afterword" to the Korean edition opens the collection. Marian Roberts was, of course, married to Simon, and cooperated intellectually with Simon especially in linking theory and practice in areas of alternative dispute resolution (ADR) such as mediation; her preface to the Korean translation follows. Michael Palmer co-taught with Simon from the late 1980s one of the first courses on ADR in the United Kingdom, and together they co-authored *Dispute Processes: ADR and the Primary Forms of Decision-Making*, the text now in its third edition (2020); his commentary on the enduring contributions of *Order and Dispute* completes the set.

[B] TRANSLATOR'S AFTERWORD

Chulwoo Lee

The author of this book was my doctoral supervisor and mentor. In 1987, while pursuing a Master's degree at an American law school, I wrote to David Schiff, who was then teaching in the Department of Law at the LSE, seeking his advice about the prospect of pursuing doctoral study there. I knew of David through a chapter he had contributed to an edited volume on the sociology of law. Having considered my research interests, David kindly advised me to state in my application that I wished to work under the supervision of Simon Roberts and Tim Murphy. I followed his advice, and both of them went on to become my supervisors. It was a great blessing for me.

At the time, I was interested in questions of law and (under) development in the Third World and was attempting to explain the reception of Western law in colonial societies through macro-

level theories such as theories of imperialism and world-systems theory. Simon helped me narrow my perspective to a manageable scope and led me into the world of legal anthropology, cultivating in me an ethnographic sensibility. In the Law and Social Theory seminar, in which four leading scholars—including my two supervisors—and around ten students engaged in discussion, Simon was the most active in seeking to impart his perspectives and knowledge. Despite supervising many doctoral students, he was unstinting with his time and enthusiasm. Full of humour and always precise, his remarks brought us much laughter and indelible clarity.

Simon understood normative rules not as clear signposts externally constraining conduct, but as a loosely constructed repertoire of resources invoked to justify action; and order not as something determined by given rules, but as a state of affairs repeatedly constituted through the process of disputing. On the basis of this theoretical perspective, grounded in field research, he sought to correct the traditional legal perspective that ranks modes of dispute processing according to the extent to which they involve the application of established rules, thereby according a privileged status to adjudication. This line of argument, which runs throughout this book, offers a way of seeing order and dispute in contemporary society in all their complexity, extending far beyond the societies with which the book itself is concerned. Simon's scholarly message also offers a practical lesson for our own society, where we need to be wary of the belief that law can solve every social problem and of the pervasive judicialization of social life.

The first edition of this book ought to have been translated when I received my doctorate and began teaching socio-legal studies at university. From the 1990s onwards, Korean socio-legal scholars, including Dohyun Kim and Seung Heum Hwang, drew on Simon Roberts' work as an important theoretical resource for the study of disputes. That this translation did not appear in step with this vigorous stream of scholarship in Korea—or, at the very least, in response to Simon's continuing scholarly endeavours after his retirement—was due to my own great procrastination. Simon passed away in 2014 at the age of seventy-three, to the great sadness of many. Conscious of my failure to see this translation into print during his lifetime, and spurred by the publication of the second edition a year before his passing, I felt a strong obligation to see the project through, only to let more than ten years pass without doing so. It was only as

I approached my own retirement that I finally managed to complete the work. I feel fortunate to have done so at last, but at the same time deeply regretful that it has taken me so long.

In translating this book, I have tried to remain as faithful as possible to Simon's conceptual and theoretical intentions. I gave priority to accuracy over elegance of prose, trying to preserve even the smallest details of the original, at the risk of occasional awkwardness. I sometimes consulted artificial intelligence (AI) about possible expressions, but there is not a single sentence that I accepted from it as it stood. In the end, beyond offering advice on the choice of particular expressions, AI was of little assistance. I am grateful to the editorial team at Hanul M-Plus for respecting my determination to retain my own style and expressions, and for editing the manuscript with meticulous care, refinement, and the highest professionalism.

This volume includes an essay on Simon Roberts's legal anthropology that was not included in the second edition. I am grateful to Professor Michael Palmer, who worked more closely with Simon than anyone, knows his scholarship intimately, and is himself a leading international authority on dispute studies. An eminent scholar of Chinese law, Michael also provided expert advice on rendering concepts with subtle shades of meaning into terms in Chinese characters. I also wish to thank Keun-Gwan Lee and Joongi Kim for their valuable advice on difficult terms and passages; Young-Kyun Yang and my other colleagues in the Contemporary Cultural Research Methodology Reading Group for suggesting translations of concepts in cultural anthropology based on established usage in the field; and Sung Ho Kim, Hyung Doo Nam, Joon Han, and Chaihark Hahm, colleagues at my university who offered encouragement and advice throughout the process of translation. Above all, I drew strength from the encouragement of Marian Roberts, Simon's wife and companion, who is herself highly respected as a practitioner and scholar of dispute resolution. I hope that this book will bring Marian and the Roberts family at least a small measure of pleasure.

[C] PREFACE TO THE KOREAN TRANSLATION OF *ORDER AND DISPUTE*

Marian Roberts

It is indeed a great privilege to be invited to write this preface to the Korean translation of *Order and Dispute: An Introduction to Legal Anthropology*, sadly in the place of the best person who could have done so, Simon Roberts himself, the author of the two prefaces of previous editions. I can only offer these more personal words but which are informed by the impact of Simon's contribution, as indispensable guide and unfailing support, to my own involvement in the field of dispute resolution practice. We were very fortunate to have been able to enjoy many creative conversations arising from our respective involvements in the field of dispute processes. While I hugely benefitted from the interdisciplinary scholarly writings to which Simon introduced me, he too was delighted to hear of their application in the vivid lived examples I brought home from the coalface of my practice as a family mediator.

As a classic work, the significance of *Order and Dispute* only increases over time. The work assumes a continuing relevance today particularly in the light of contemporary developments associated with the growth of ADR processes, mediation in particular, and the transformation that has occurred in the formal civil justice system, certainly in England and Wales. As Simon's latest ethnographic research confirmed, the primary responsibility of the court is now explicitly identified as one of sponsoring settlement. Consequently, judicially endorsed negotiation leading to settlement of the justiciable issue supersedes the historic primary adjudicative role of the court acting as the agency of rule-based trial and judgment. Official endorsement of what is termed non-court dispute resolution relegates access to court to a last resort in the family justice system.

As an introduction to legal anthropology, the preface to the first edition states that its "primary object here is to provide something for the newcomer, whether an interested layman or the prospective student". There is now a greatly enlarged contemporary prospective audience for whom this work is essential reading—scholars, researchers, policy makers, judges and lawyers as well as arbitrators and mediators. As was observed in the United States in the 1980s and more so nowadays, legal professionals "tumble over each other in their enthusiasm for nonlegal dispute resolution alternatives" (Auerbach 1983: 15). The fundamental

theoretical as well as practical transformation involved in the transition from a primary partisan, representative and advisory role of the lawyer into the non-aligned facilitatory role of the mediator requires the adoption of a new mental universe in which a richer and broader socio-legal dispute process paradigm replaces an ethnocentric legal perspective. This is what this book so lucidly and authoritatively provides.

It is a measure of the highest esteem and warmest respect with which Simon regarded Professor Chulwoo Lee that the safe and expert translation of this, his most loved work, was entrusted. This Korean translation has been the fruit of Professor Lee's remarkable long-term dedication and commitment. This comes with my heartfelt thanks to Professor Lee and to all his colleagues who have contributed to this achievement. How appreciative, proud and honoured Simon would have been to know that his work is now accessible to a new audience in a new country.

[D] SIMON ROBERTS' *ORDER AND DISPUTE*: ENDURING CONTRIBUTIONS TO LEGAL ANTHROPOLOGY, COMPARATIVE LEGAL STUDIES AND CONTEMPORARY DISPUTE RESOLUTION

MICHAEL PALMER

Simon Roberts' *Order and Dispute: An Introduction to Legal Anthropology* (Roberts 1979; 2013a) endures as a foundational text that fundamentally challenges traditional Western-centric conceptions of law and social order. The book's continuing significance rests on several interconnected contributions that continue to shape legal anthropology, comparative legal studies, and contemporary approaches to dispute resolution. I am delighted that Professor Chulwoo Lee has, with great vision and skill, translated this seminal study into Korean so that Korean readers may also enjoy and benefit from the many important insights that the book has to offer.

Following graduation in 1962, Simon Roberts (hereafter, "Simon") went to southern Africa, spending two years teaching at the law school in what is now Malawi, and subsequently serving as Adviser on Customary Law to the Government of Botswana, during which time he conducted ethnographic fieldwork research among the principal Tswana tribal

groups in Botswana.[1] This direct engagement with a legal culture in southern Africa helped to shape Simon's theoretical approach and gave him a rich empirical foundation for challenging conventional legal theory. As General Editor of the *Modern Law Review* from 1988 to 1995, Simon influenced numerous legal scholars and strengthened the journal's reputation. After he passed away in April 2014, the journal established the Simon Roberts Scholarship in his memory, awarded annually to outstanding research students in legal anthropology, legal ethnography and socio-legal studies.[2] His final book, *A Court in the City: Civil and Commercial Litigation* in London at the Beginning of the 21st Century, applied ethnographic methods to the Mayor's and City of London Court, demonstrating that his anthropological lens could work as powerfully on contemporary English institutions as it had on the Kgatla people decades earlier (Roberts 2013b).

Decentring "law" from formal institutions

Simon contended that legal theory had become too deeply embedded in the formal legal frameworks of Western societies to be of much help in cross-cultural studies of order. By examining societies lacking such formal systems yet maintaining orderly social life, Simon demonstrated to his readers that order emerges not so much from state enforcement but ordinarily through diverse social processes and cultural practices—arrangements that might or might not include official legal institutions, actors, processes and rules.[3] Simon's critique showed comparative legal studies in particular that the reliance of traditional legal analysis on Western institutional arrangements—especially courts of law and their judges—limits the effectiveness of such analysis for cross-cultural study (Roberts

[1] This publication was a major contribution to the project led by Professor A N Allott at SOAS, entitled a *Restatement of African Law*. The project represented a significant scholarly effort to document African customary legal systems during the period of decolonization, though it was not without its critics. Somewhat later, Simon and other scholars raised doubts about whether the restatement approach had been appropriate, pointing out that, as the *Restatement* was largely modelled on Western legal methodology, it failed to capture the processual dynamics and contextual nature of customary law in practice.

[2] In addition, in honour of Simon, the *MLR* Committee published a special issue on alternative dispute resolution and legal pluralism, two core areas of Simon's scholarship.

[3] Simon used the concept of "arrangements" to a significant extent in his writings. It was a choice that reflected his theoretical commitment to refrain from imposing Western categories on other social formations, leaving open what those might be, and suggesting things people have worked out, patterns that exist, without claiming they are necessarily "systems", "structures", or products of conscious design.

1979: 17-29).[4] Simon's work contributed substantially to a fundamental shift in the manner in which social anthropologists and others understood the relationship between law, order and social control. His approach complemented Edward Said's critical observation that among many scholars there was an unfortunate tendency to impose Western frameworks onto non-Western societies (1978; Roberts 1998: 99-100), rather than seeking to understand ordering mechanisms on their own terms.

Simon's early ethnographic observations demonstrated that societies without formal courts employ processes such as avoidance, self-help (including violence, either in ritualized or direct form), negotiation, and mediation, and seek outcomes that prioritize reconciliation and relationship repair over adjudication and its often binary decision-making leading to "win–lose" outcomes (Roberts 1979). Thus, examining the distinctive processes by which Kgatla customary courts handle matrimonial disputes, Simon observed that two crucial features of the judicial process were:

> The involvement of the families of the respective parties and the importance attached to achieving reconciliation or at least a solution acceptable to both sides. Without an understanding of these aspects, the objectives and content of the substantive law are hard to grasp.
>
> One problem encountered in using customary court records as a primary source was that of abstracting principles of general application from the account of an individual dispute. Such principles are not found on the surface of a record, as judgments of Tswana courts seldom contain an express formulation of the abstract rules followed in reaching the decision. General principles have to be reached instead by reading the judgment together with facts related, and assumptions made, by the parties and other speakers in a dispute. To take an example. While many disputes turn upon the question of whether a valid customary marriage has been contracted between two parties, you never find a judgment in which the essential requirements of a valid marriage are expressly stated (Roberts 1972: xi).

Simon's fieldwork, conducted over extended periods and revisited in subsequent work with John Comaroff, provided empirical grounding for his theoretical claims about the diversity of

[4] Similarly, Simon sometimes uses "talking" instead of "negotiation" or "mediation", choosing deliberately ordinary language that does not prejudge what is happening.

ordering mechanisms across human societies (Comaroff & Roberts 1981).

From rules to processes: a paradigm shift

A pivotal contribution of *Order and Dispute* is Simon's analytical shift from studying legal "rules" to examining dispute "processes". This turn in perspective, influenced in particular by the work of anthropologists such as Bronislaw Malinowski (1926), Philip Gulliver (1963; 1973; 1979) and Max Gluckman (1955), marked a significant departure from earlier approaches that had focused primarily on the identification and analysis of rules in small-scale societies. The focus thus moves from "rules" and their application as a way of creating outcomes to analysing various dispute "processes", their use, context and the kinds of outcome to which they lead (see Benda-Beckmann & Turner 2018: 259).[5] Malinowski's pioneering work on Trobriand law (1926) was especially important, Malinowski contending that the Trobriand Islanders possessed a well-developed system of "civil law", driven by the principle of reciprocity. Social order was upheld through an intricate network binding individuals with mutual and interdependent obligations. Other important influences included Isaac Schapera's *Handbook of Tswana Law and Custom* (1955 [1938]) and several of his other works (1940; 1943), Karl Llewellyn and Adamson Hoebel's *The Cheyenne Way* (1941); Gluckman's analysis of judicial processes among the Barotse (1955); Victor Turner's examination of the Ndembu (1957); Paul Bohannan's studies on the Tiv (1957); and Philip Gulliver's studies of the Arusha of northern Tanganyika, and the Ndendeuli of Southern Tanzania in regard to issues of social control and dispute settlement (1963; 1973; 2023 [1971]). Simon characterized these works as "classics", drawing on their ethnographic richness as well as their theoretical insights. He also gave due attention to the work of Richard Abel, Laura

[5] Note also the study by Hart & Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1994), work that was well-known in law schools in the United States long before its formal publication because it was circulated in mimeographed form in many law schools as a draft edition in the late 1950s onwards. Like the legal anthropological approach, this parallel processual approach rejected the idea that law is simply a matter of applying pre-existing rules mechanically, emphasized that understanding law requires looking beyond formal rules, recognized that rules alone often do not determine outcomes, and insisted that context matters in understanding how law operates. But it seems to have developed in an independent fashion, primarily as a normative response to legal realism, focusing on how judges and officials should reason within formal legal institutions and which institution (court, legislature, or agency) possesses the appropriate competence to resolve particular problems. Their concept of "process" centred on institutional procedures, reasoned elaboration, and principled decision-making within the American legal system. Thus Hart and Sacks worked within Western institutional assumptions to improve legal reasoning, and their approach was therefore not as innovative as that offered by legal anthropologists such as Simon.

Nader and other writers in the emerging field of socio-legal studies of dispute resolution.[6] Schapera occupied a special place in supporting and encouraging Simon's work at the LSE. Simon acknowledged Schapera's "constant encouragement and expert help" throughout the writing of *Order and Dispute*, and expressed regret that Schapera never wrote his own theoretical treatise on law (Roberts 2013a: "Preface" to the first edition. Simon wrote a moving obituary for Schapera, pointing out that Schapera's work "openly portrayed a group of societies already encapsulated in the colonial world, and so avoided any impression of presenting a pristine culture" (Roberts 2003). Simon's Kgatla fieldwork followed in Schapera's footsteps, examining in particular the distinctive processes by which Kgatla customary courts handle disputes.

Simon's analysis distinguishes between "ordering" (the maintenance of social peace through ongoing social mechanisms) and "disputing" (the specific handling of disagreements when they arise), revealing how disputes are "named, blamed, and claimed" differently across cultures (Roberts 1979; Felstiner,& Ors 1980-1981). His identification of key processes—negotiation (bilateral, face-to-face communication, with the parties sometimes assisted by partisans, sometimes not), mediation (communication facilitated through a third-party channel), talking as emotional de-escalation, alongside social sanctions such as ritual, shaming, or ostracism—provides a framework for understanding dispute management well beyond adversarial litigation and adjudication (Roberts 1979). This processual approach proved highly influential in the subsequent development of legal anthropology. Comaroff and Roberts' later collaborative work, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981), further elaborated this framework, demonstrating how the cultural logic of dispute resolution must be understood in relation to broader patterns of social relationships and normative understandings.[7] The emphasis on processes rather

[6] See, for example, Abel (1982a; 1982b) and Nader (1979; 1993).

[7] See, for example, Lee (1998) who utilized Simon's insights for a better understanding of law and dispute resolution in his analysis of international economic law and development issues. Lee's essay applies Simon's legal anthropology framework to show that New International Economic Order (NIEO)—1970s proposals initiated by developing nations (via the United Nations and its G77 states) to restructure the global economy and aimed at reducing dependency on wealthy nations and eliminating post-colonial economic inequalities—operated as flexible discursive resources rather than rigid legal rules. Both developing and developed nations strategically invoked these principles to advance their competing interests—demonstrating Simon's insight that law often functions as a "loosely constructed repertoire" deployed in practice. This perspective revealed international legal principles as functioning as malleable tools in political-economic struggles, especially when formal legal status remains ambiguous.

than rules shifted attention from static normative systems and the imposition of rules to the dynamic, contextualized ways in which people actually manage interpersonal disagreement and maintain social order.

Cultural logic over legal formalism

Simon thus encouraged us to attend to the "cultural logic" underlying dispute resolution, where social, economic, and political factors—not just legal rules—shape outcomes (Roberts 1979). This emphasis on cultural logic represented a significant departure from what Bohannan had termed the danger of imposing "folk systems" from one's own society onto others as analytical frameworks (see also Bohannan 1957: 5).

Simon also argued that understanding dispute processes requires grasping the unexamined, underlying meanings and patterns that give coherence to seemingly diverse practices—what Clifford Geertz described as the interpretative dimension of ethnographic work (Geertz 1973; Roberts 1998: 99-100). In Simon's analysis, the effectiveness of any dispute resolution process is not something that is to be assessed abstractly. Instead, it must be understood in relation to the social bonds, economic dependencies, and political structures within which it operates. Drawing on Georg Simmel's insights into dyadic and triadic social situations, Simon saw an important difference between bilateral decision making and third-party intervention in which the intermediary figure either has the authority to impose an outcome (adjudication) or does not (mediation) (Simmel 1955).

This approach has profound implications for how we understand what "law" is and does. Rather than identifying law with a particular set of institutions or formal rules, Simon's framework encourages us to examine how social order is actually produced and maintained through diverse mechanisms that may not be recognized as "legal" in Western terminology (Roberts 1979). This insight proved foundational for subsequent work in legal pluralism, even as Simon himself later voiced scepticism about some directions in legal pluralism scholarship (Roberts 1998; 2005). In addition, Simon's emphasis on cultural logic shared important affinities with the emerging "law in context" perspective, both rejecting autonomous legal analysis in favour of holistic, embedded understanding. However, while the "law in context" movement in British legal education (prominent from the 1970s

onward) emphasized situating law within social, economic, and political structures, Simon's more anthropological approach added a crucial dimension: the need to grasp the internal cultural logic through which members of a society understood their own dispute processes, rather than imposing external analytical categories.

ADR and the recovery of "alternative" mechanisms

Well beyond its ethnographic value, *Order and Dispute* offers critical tools for understanding contemporary ADR and broader questions about the nature of legal ordering in modern societies (Roberts 2013b). Simon's work encourages reflexive examination of Western legal systems through an anthropological lens, revealing formal adjudication as merely one approach—often neither the most effective nor the most culturally appropriate—to managing "social messes".

The book's insights resonate particularly strongly in understanding the proliferation of ADR mechanisms—mediation, arbitration, restorative justice programmes and so on—that has emerged (or reemerged) in many jurisdictions since the book's initial publication in the late 1970s. Simon's framework helps us understand these not as novel inventions but as recoveries of dispute-resolution logics that have always existed alongside, and often in tension with, formal adjudication. His analysis reveals that the "alternative" in ADR might more accurately be understood as the normative baseline from which state-centred adjudication represents the real departure (see also Sander 1976; Twining 1993).[8]

Simon's subsequent work co-teaching ADR on the University of London Intercollegiate LLM and jointly authoring the text *Dispute Processes: ADR and the Primary Forms of Decision-Making* (2020—now in its third edition), extended these insights by providing a comprehensive analysis of negotiation, mediation, and umpiring as "primary forms" of decision-making (Palmer &

[8] Although not a form of ADR in which Simon took a special interest, this and other insights have been especially salient also in the development of restorative justice approaches, many of which explicitly draw on indigenous and other non-Western dispute resolution traditions (Hankes & Ors, 2012). Contemporary indigenous restorative justice programmes in North America, New Zealand, and elsewhere demonstrate the ongoing vigour of the kinds of ordering mechanisms Simon documented, even as they adapt to modern contexts (Canadian Institute for the Administration of Justice 2016; van Schilfgaarde 2024). As Native American justice practitioners have themselves noted, traditional peace-making processes—bringing together victims, offenders, and their supporters to restore harmony and balance—long preceded the Western "rediscovery" of restorative approaches (Yazzie 1998; Zion 1999).

Roberts 1998; 2020; Roberts & Palmer 2005). This work was greatly encouraged by William Twining (Palmer & Roberts 2020: "Acknowledgments"), and also benefitted very significantly from the work and insights of Marian Roberts, drawn from her practical experience of mediation-based dispute handling, especially in family matters (see, for example, M Roberts 2014). The text demonstrates several key points, including: first, how early anthropological insights about dispute processes in non-Western societies usefully illuminate contemporary debates about civil justice reform across diverse jurisdictions; and, secondly, how empowering disputants to handle better their disagreements represents an important value.

Legal pluralism and multicultural societies

Roberts' emphasis on the "cultural logic" of dispute resolution also remains vital for understanding legal pluralism in multicultural societies and postcolonial contexts (Twining 2010). His insistence that we look beyond formal rules to the social, economic, and political factors shaping dispute outcomes provides analytical tools for examining how different normative orders coexist, conflict, and negotiate accommodation within single jurisdictions (Tamanaha 2008).

This is particularly important in contexts where state legal systems interact with indigenous, customary, or religious legal orders. More recent scholarship on indigenous justice systems, conflicts over resource rights, and the role of customary law in postcolonial states (Benda-Beckmann & Benda-Beckmann 2006; Gebeye 2017) builds directly on the analytical framework Simon established. His work helps us understand that what appears as "legal pluralism" from a state-centric perspective may be better understood as the normal condition of social ordering, in which multiple normative systems and dispute resolution mechanisms coexist and interact (Merry 1988).

However, as noted above, Simon himself later expressed reservations about the direction of legal pluralism scholarship, particularly what he saw as an "enlargement of the legal domain" that risks imposing a specifically "legal" framework onto social phenomena that participants might not themselves recognize as law (Roberts 1998: 95-106).[9] This sceptical stance reflects Simon's consistent concern that

[9] See also his essay in which Simon urges caution in extending legal discourse to negotiated orders at local or global levels while they remain significantly different from state-level legal orders (Roberts 2005).

analytical categories should emerge from careful ethnographic attention to how people actually understand and manage social order, rather than from theoretical commitments imposed from outside (see also Tamanaha 2021: 167).

State authority and community-based governance

In an era of growing scepticism about state institutions and increasing interest in community-based governance, Simon's demonstration that order can be maintained without centralized enforcement mechanisms speaks directly to contemporary debates about the scope and limits of state authority (Roberts 2005). His work reminds us that the state's claim to monopolize legitimate dispute resolution is historically contingent and culturally specific, neither universal nor inevitable.

The contemporary relevance of Simon's work extends beyond specific institutional reforms to fundamental questions about how we conceptualize justice, authority, and social order. As legal anthropologists Keebet von Benda-Beckmann and Bertram Turner have argued, Simon's processual approach helps us see that the significance of law derives from its use in social, economic, and political life in general, and not just from the resolution of disputes (2018: 264). This broadened perspective remains essential for understanding how people actually navigate normative complexity in contemporary societies.

Methodological contributions

Finally, Simon's work offers enduring methodological lessons for comparative legal studies. His ethnographic approach—combining extended fieldwork, careful attention to actors' own understandings, and sophisticated theoretical reflection—set a standard for subsequent legal anthropology and remains a model for empirical comparative legal studies (Good 2018; Palmer 2024: 132-134).

The book's accessibility to both specialists and general readers, confirmed by its inclusion in the Classics of Law and Society series and its 2013 second edition with new foreword and afterword by Simon (Roberts 2013a), ensures its continued use in bridging legal theory, anthropology and comparative legal studies. It remains essential reading for anyone seeking to understand the diverse institutional arrangements through which human communities maintain social order across vastly different cultural and political contexts.

Conclusion

Order and Dispute endures because it asks fundamental questions about how humans create and maintain social order, and it refuses easy answers rooted in Western institutional assumptions. Simon's work in legal anthropology demonstrates that order can arise from decentralized mechanisms like kinship, reciprocity, and reputation rather than centralized authority. He reframed dispute resolution as a continuum of processes, repositioning "alternative" methods like mediation and negotiation as primary. Simon highlighted the influence of economic and political organization on the handling of disputes, critiqued the focus on doctrinal clarity in reforms, and argued that rules often function primarily as rhetorical tools. He questioned hierarchical governance, advocated for justice systems beyond the ruler/ruled model, and emphasized the social functions of public dispute processes. Simon was also a strong supporter of the idea that legal pluralism is the norm, not uniformity, and that non-use of formal systems often reflects rational choice. His work remains foundational for understanding law, justice, and dispute resolution in diverse contexts.

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Making Authority Visible: Bodily Discipline and the Political Appropriation of the Visual Grammar of Judgment in *Farewell My Concubine*

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Abstract

Using four sequences from *Farewell My Concubine*—opera-school training, stage performance, a formal courtroom, and a Cultural Revolution struggle session—this article examines how bodily posture, costume, voice, space and spectatorship render roles and authority socially legible. It distinguishes legal authorization from embodied legibility and argues that the visual grammar of judgment is portable across institutional settings: it may present lawful procedure, but coercive rituals lacking defence, independent adjudication, and remedy may also appropriate it. Through structured comparative close reading, the article shows why recognizable performances of judgment cannot themselves establish legal validity and why "visual law" must attend to authorization and contestability.

Keywords: visual law; *Farewell My Concubine*; bodily discipline; judicial authority; struggle sessions.

[A] INTRODUCTION: WHEN THE BODY GETS THE LINE "RIGHT"

The opera-school sequences in *Farewell My Concubine* render "correction" as a bodily event. Xiaodouzi sings the line from "The Nun's Wandering Thoughts (Si Fan)" as "I was born a young man, not a delicate maiden," reversing the gendered self-description; Shitou picks up an opium pipe and forces its stem into his mouth. Once blood appears, Xiaodouzi finally gets the line "right": "I was born a delicate maiden, not a young man." Existing film scholarship has documented this action and sequence (He 2023: S124). The moment does not prove that some inner identity has been rewritten

by a single act of violence; more precisely, a line deemed "correct" is pressed into the body—through punishment, repetition, and the witness of others—until it acquires a publicly recognizable form.

This raises a legal question: besides institutional authorization, must authority also appear in some bodily and sensory form in order to be recognized and acted upon in social interaction? This article answers in two layers. The first is formal authorization: legal systems allocate, through rules of recognition, appointment, jurisdiction and procedure, who is entitled to render binding judgment in law's name (Hart 2012). Legal validity cannot be read directly off a robe, a tone of voice, or a raised bench; the operation of legal authority is also shaped by a juridical field structured by professional qualifications, institutional boundaries, and relative autonomy (Bourdieu 1987). The second layer is what this article calls embodied social legibility: posture, voice, costume, architecture, speaking order and audience position render authority visible, audible and intelligible in public experience. The latter can reinforce, weaken or distort people's experience of the former, but it is not a substitute source for it.

This distinction also requires separating "recognition", "obedience", and "legitimacy". One may recognize who is presiding over a ceremony, and may obey out of fear, without believing that power to be rightful. Legitimacy typically denotes a normative judgement: people regard an authority as appropriate, rightful, and worthy of voluntary compliance; it cannot be inferred directly from bowed heads, silence, or synchronized chanting (Tyler 2006). This article therefore does not treat bodily postures as transparent evidence of inner belief, but as an observable way of registering participants' positions within an arrangement of power.

Law and performance scholarship has already shown that adjudication is not purely a matter of abstract norms: trials are publicly enacted through space, role, audience and sensory form (Peters 2022; Goodrich & Ors 2026). "Visual law" further asks how image and aesthetic form organize legal judgment (Sherwin 2011). Notably, Arianna Careddu and Paolo Vargiu (2025), writing in this journal, observe that judicial authority acquires visible form through the aesthetic construction of body, voice, architecture and symbol. The present inquiry shifts attention to the institutional limits of that visual grammar: what occurs when "trial-like" roles, postures, and procedural sequences move from an authorized courtroom to the stage or a political struggle session?

The article's central claim is that the "visual grammar" of judgment is portable, and therefore appropriable. Visual grammar here does not refer

merely to static images, but to the multimodal relational structure jointly constituted by bodily posture, spatial hierarchy, costume symbolism, sound, speaking order and viewing position. It can help an authorized court present procedural order, but it can equally be borrowed by political rituals lacking judicial authorization, defence or remedy, to manufacture a recognizable scene of judgment.

The article uses a structured comparative close reading of four purposively selected sequences: opera-school training; stage performance; a struggle session; and a formal courtroom. Each is analysed along four dimensions—role differentiation, procedural sequence, fact-production and sanction-orientation. The sections follow an analytical progression from bodily training, through role recognition, to political appropriation and legal boundary rather than the film's chronology. The comparison does not claim that opera training caused struggle sessions or that stage, courtroom and struggle session are equivalent institutions. Timecodes follow the 2:44:26, 25 fps Blu-ray edition used by the author. Film stills are reproduced solely for criticism and scholarly commentary; copyright remains with the relevant rights holders.

[B] CORRECTING THE BODY: PUNISHMENT, REPETITION AND THE LEGIBILITY OF THE NORM

Butler's theory of performativity offers a starting point for reading the training scenes. Gender is not a stable essence subsequently expressed through action; it is an identity-effect continuously constituted, within frameworks of social sanction and norm, by repeated and stylized bodily acts (Butler 1988; 1990). Butler later stresses, through the notion of "citationality", that a bodily act becomes intelligible because it repeats and reworks a pre-existing norm (Butler 1993). But performativity cannot be reduced to a performance freely chosen by an actor, nor equated directly with theatrical performance—Chengzhou He, analysing *Farewell My Concubine*, specifically reaffirms this limit (2023: S123–S124).

The value of the pipe scene lies in the way it renders the "citation" of a norm as a recognizable chain: a mis-sung line exposes a discrepancy between the body and the role's script; a peer's physically invasive coercion forcibly halts that discrepancy; the correct line then reappears in a form audible to all present. Punishment here is not merely retribution for error but a technology for producing legibility—it converts "what counts



Figures 1a–1b: Line-correction as bodily discipline: the forcible insertion of the opium pipe into the mouth (top, 00:33:02), and blood at the corner of the mouth after correction under the collective gaze of his peers (bottom, 00:34:20). Farewell My Concubine *(Chen 1993); stills prepared by the authors.*

as a recognizable Yuji" into a set of vocal and postural standards that can be checked, corrected and repeated. Notably, the school master is not the only enforcer of the norm: Shitou's violence toward Xiaodouzi shows that norms can also be transmitted between peers, so that a trainee is simultaneously the object of discipline and a potential agent of it.

Figure 1a uses an extreme close-up that severs surrounding space, compressing the gripping hand, the pipe and the open

mouth onto a single visual plane, so that "correction" first appears as an invasion of bodily boundary; Figure 1b shifts to a more open group shot, juxtaposing the blood at the mouth with a peer's gaze, so that the outcome of violence becomes a mark recognizable to the group. The cut from an afflicted body to collective spectatorship supports not an inner identity rewritten in a single stroke, but a norm acquiring legible form through bodily force, public witness, and subsequent repetition.

Repeated performance of the dan role should not be treated as a single cause of Cheng Dieyi's gender, desire or life outcome. If the same training regime necessarily produced the same identity, it would have to produce identical outcomes in every male dan performer, which it plainly does not (He 2014; Xing 2022; He 2023). The film supports a narrower claim: discipline compels the body to meet a publicly recognizable standard of role. The legal analogy is similarly limited. Both operatic and judicial roles must be socially legible, but their institutional foundations differ: a judge's authority derives from legal authorization, whereas an actor's role derives from theatrical convention. Bodily performance may strengthen or weaken the credibility of either role, but it does not erase that distinction.

[C] FROM REPETITION TO RECOGNITION: HOW SPECTATORSHIP MAKES A ROLE CONVINCING

That the adult Cheng Dieyi becomes "Yuji" on stage signals that the weight of training has shifted from correction to recognition. Costume, make-up, vocal style and posture form a shared repertoire of operatic signs; the audience does not mistake the performer for a historical person, but recognizes the role as established within an agreed aesthetic frame—the credibility of the character comes from the completion of convention and craft, not from verification of the performer's private identity (Tian 2000). Recent historical scholarship likewise notes that cross-dressing performance may both destabilize gender binaries and coexist with objectification, sexualization and social hierarchy (Ren 2024).

The film further gives this recognition a double structure of spectatorship: the audience within the diegesis watches Yuji, while the audience beyond the screen simultaneously watches how Cheng Dieyi is organized by the stage, the camera and others'



Figures 2a–2b: A stage role established through spectatorship: make-up, headdress, costume and figural relation render "Yuji" and "Xiang Yu" recognizable (top, 01:00:11); the full-stage shot draws the audience into the same structure of recognition (bottom, 01:00:33). Farewell My Concubine *(Chen 1993); stills prepared by the authors.*

gazes—this intermedial relation between Chinese cinema and opera is not decorative "play-within-a-play", but actively arranges the position from which the audience identifies (Mello 2023). Cheng Dieyi's recognizability is therefore not achieved by him alone: operatic convention supplies the signs, the theatre audience supplies immediate recognition, and the film's narrative refracts the stage role against his life experience.

Figure 2a uses a closer shot scale to foreground make-up, headdress, costume and stylized gesture,

presenting character identity as a set of legible visual signs; Figure 2b then pulls back to a full stage shot, letting the audience's dark silhouettes occupy the lower edge of the frame. This shift in scale, from medium close-up to wide shot, not only shows how the role is encoded, but also places both the theatre audience and the extra-diegetic audience within the same chain of spectatorship, so that the role attains recognition through shared convention and collective watching.

This offers a limited but useful analogy for legal authority. A judge is likewise swiftly recognized through robe, seating, form of address, speaking order and others' cooperative deference; judicial scholarship documents how demeanour and communicative style shape the experience of fairness and authority (Mack & Roach Anleu 2010; Roach Anleu & Mack 2015). But stage recognition is an aesthetic convention, whereas judicial recognition remains bound by public-law authorization, procedural duty and remedial mechanisms. The audience's belief that "Yuji is established on stage" and a litigant's acknowledgment that "this person is entitled to render binding judgment" are not the same kind of normative act.

The legal analogy cannot exhaust the film. To treat Cheng Dieyi merely as a specimen of the "recognizable body" would flatten the queer affect, intimacy and historical forces that structure the film (Hsu 2012). The stage sequence therefore serves as a mediating step rather than the model's conclusion: recognition is jointly produced by performer, convention and audience, while the next section shows how that structure is deformed within a coercive political ritual.

[D] PERFORMING JUDGMENT: HOW THE STRUGGLE SESSION APPROPRIATES THE VISUAL GRAMMAR OF JUDGMENT

The struggle-session sequence in *Farewell My Concubine* places its characters within public accusation, mutual denunciation and crowd surveillance. Who may question and who must answer, who stands and who bows the head, and which account may be established on the spot as "fact," are all arranged by an asymmetric order of space and speech. Scholarship on the Cultural Revolution documents how public struggle sessions relied on role-typing, formulaic language, accusation and performative violence to display political power and organize mass participation (Yuan & Ors 1990; Wang 2014). The film does not simply depict an unruly quarrel; it presents a choreographed scene of public judgment: private relations are converted under pressure into



Figures 3a–3b: Political appropriation of the visual grammar of judgment: the body displayed under a placard before the crowd's gaze (top, 02:28:27); costume, placard, flame, red flags and crowd compose the struggle scene (bottom, 02:32:48). Farewell My Concubine *(Chen 1993); stills prepared by the authors.*

testimony, identities are renamed, and the crowd's presence lends the humiliation its public character.

Figure 3a adopts a diagonal, kinetic composition in which the body is pulled open, fixed and put on display by others, rather than appearing as a self-narrating subject; Figure 3b shifts to an almost frontal crowd tableau, with flame in the foreground and red flags and the crowd behind, converting operatic costume from a sign of character into evidentiary material for political accusation. Red, smoke, flame and ranks of orderly crowd fill the frame together, placing the

extra-diegetic audience, too, in the position of witnessing public sanction. The two frames together show that the struggle session can borrow role differentiation, public witnessing and sanction-orientation to manufacture a scene that "looks like judgment", even as this recognizability cannot supply the judicial authorization and procedural safeguards that are absent.

To call this a "trial-like ritual" is not to say that the struggle session is a trial, still less to grant it legal status. Show trials, theatrical trials, and lawful trials must be kept conceptually distinct (Arjomand 2018). In this article, "trial-like" functions only as an analytic screening device, used to identify the formal grammar shared by political ritual and trial, without pronouncing on legality. Specifically, four interrelated features may be observed:

1 role differentiation: accusers, accused persons, organizers or enforcers, and spectators occupy differentiated positions;
2 procedural sequence: accusation, interrogation, response, confession or pronouncement unfold in a recognizable order;
3 fact-production: denunciation, testimony and public statement are compiled into a version of "fact" that those present are required to accept;
4 sanction-orientation: the ritual is directed toward humiliation, punishment, exclusion or the stripping of identity, rather than open-ended discussion.

These features explain how a ritual may be made to look like a trial; they do not make it law. The decisive contrasts are authorization and contestability. This article uses fairness, a public hearing, a genuine opportunity to be heard and independent adjudication as contemporary analytical yardsticks (International Covenant on Civil and Political Rights 1966: Article 14), not as standards retrospectively attributed to the Republican-era court depicted in the film. A lawful trial at least claims to operate under pre-existing authority and procedural duties, and to permit defence, objection, reasoned decision and review. The struggle session instead has roles and conclusions fixed by mass-campaign politics. It lacks a neutral adjudicator, a right of defence, evidentiary standards and effective remedy. Although it has no lawful judicial authorization, it produces severe political, social and bodily consequences. It is therefore better understood as non-judicial coercion performed through the appearance of judgment.

Degradation, audience and coerced participation

The struggle ritual aims not only to establish that some act occurred, but to rewrite who a person "is". Harold Garfinkel (1956) characterizes such public processes as status degradation ceremonies: the denouncer speaks in the name of the collective, interprets a specific act as evidence of an entire character, and pushes the accused beyond the community's moral boundary. The mutual denunciation in *Farewell My Concubine* enacts precisely this transformation. Characters are not merely asked what happened, but are compelled to reinterpret each other's past through political labels; fact-production and identity-production thus merge within the same scene.

Nor should the crowd's movements and slogans be read as direct evidence of inner belief. As a cross-contextual theoretical reference, Lisa Wedeen (2015) argues that authoritarian ritual may require public performance "as if" one believes, thereby producing compliance without proving conviction. The article borrows this mechanism without equating Syria with Cultural Revolution China. Elizabeth Perry (2021), likewise, illuminates how work teams and "ritual specialists" reshape identities through denunciation, oath-taking and public ceremony; it is used here as a mechanism-level comparison, not as direct evidence about the film's particular struggle session. Bowed heads, silence, slogans and mutual denunciation therefore first register coercive positioning; without further narrative evidence, sincere belief cannot be inferred.

This boundary also guards against conflating "politicization" with "lacking law". The formal post-Mao trial of the "Gang of Four" likewise carried a heavy political and symbolic charge, yet it strove, through courtroom, legal text and procedural form, to distinguish itself from mass-campaign politics (Cook 2016). The question is not whether a trial possesses theatricality—every public trial possesses some presentational structure—but whether its performance is bound by authorization, evidence, defence, and reviewability.

[E] THE BOUNDARIES OF VISUAL LAW: AUTHORIZATION, LEGIBILITY AND CONTESTABILITY

The domains above form a single but asymmetric comparative frame. Stage role, formal judicial authority and struggle ritual all achieve social legibility through body, symbol and spectatorship, yet their normative sources and consequences differ. The stage relies on aesthetic convention, the court on legal authorization and the

Dimension	Stage Role (Yuji)	Formal Judicial Authority	Struggle Ritual
Source of norm	Its normative source is operatic convention and aesthetic tradition.	Its normative source lies in the Constitution, law, appointment, jurisdiction and procedure.	Its normative source is the organizational power of a political movement and its ideological script.
Visible/audible form	It becomes visible and audible through vocal style, posture, make-up and costume.	It becomes visible and audible through robes, forms of address, seating, speaking order and spatial boundaries.	It becomes visible and audible through standing positions, bowed heads, slogans, interrogation and public denunciation.
Position of the viewer	The viewer recognizes the role as established within an aesthetic convention.	The viewer observes, participates and may contest the proceedings as a party or member of the public.	The viewer is organized as a witness, respondent, spectator, or co-enforcer.
Principal consequence	Its principal consequence is aesthetic and narrative.	It produces a legally binding decision that carries legal responsibility.	It produces serious *de facto* political, social and bodily consequences.
Formal judicial authorization	Not applicable; the role is created by theatrical convention.	It possesses formal judicial authorization, although specific acts may exceed or violate that authority.	It possesses no lawful judicial authorization.
Contestability and safeguards	Its contestability is governed by artistic judgment and theatrical convention.	It is, in principle, contestable through defence, evidence, reason-giving and review.	Its conclusion is predetermined, and it lacks a neutral adjudicator, defence and an effective remedy.
Recognition and identification	The viewer may recognize the role without believing that it is real.	Recognizing the office does not amount to endorsing the decision; legitimacy still requires evaluation.	Public compliance may result from fear, and sincere belief cannot be inferred from it.

Table 1. A controlled comparison of the stage role, formal judicial authority, and the struggle ritual.

struggle session on mass-campaign organization and coercive power. The training sequence functions as a genealogy of embodied legibility rather than as a fourth authority-bearing domain and is therefore omitted from Table 1. Shared form does not entail shared validity: the table separates how authority looks from the basis on which it acts.

Figure 4a uses deep, axial composition to place the bench at the highest and furthest point, while the central aisle, speakers, railing and public gallery occupy successive spatial tiers. Figure 4b tightens the shot and exposes the standing participants to the combined gaze of the court and the audience. Symmetry, elevation and railing translate institutional roles into visible spatial relations, but cannot substitute for jurisdiction, authorization, evidence or remedy. Cheng Dieyi's later release through Yuan Shiqing's intervention also warns against treating formal architecture as proof of procedural justice. The scene is used only to identify the spatial grammar



Figures 4a–4b: Spatial choreography of a formal trial: the raised bench, central aisle, railing and public gallery differentiate procedural roles (top, 01:49:22); a closer shot separates the speaking area from the viewing area (bottom, 01:51:26). Farewell My Concubine *(Chen 1993); stills prepared by the authors.*

through which judicial authority is presented, not to endorse the proceeding it depicts.

This comparison also shows why visual form is not a necessary condition of lawful authority. Legal validity derives from rules of authorization; even if a judge appears clumsy or the courtroom is modest, authority does not simply vanish for aesthetic failure. Conversely, a ritual, however highly recognizable and tightly ordered, does not thereby acquire legal status merely from the appearance of a trial. Visual and sensory form is better understood as a medium for the public presentation of authority: it shapes whether

participants can understand roles, anticipate procedure and experience fairness, and it may equally conceal overreach, bias or coercion.

Empirical research makes this judgment more concrete. Judicial demeanour and the communication of decisions shape how litigants experience fairness and authority (Mack & Roach Anleu 2010; Roach Anleu & Mack 2015); video links change a judge's image and position of interaction (Rowden & Wallace 2018); courtroom architecture and boundaries encode hierarchy and procedural values (Mulcahy 2011). Research on legal ritual similarly indicates that space, dress, bodily co-presence and atmosphere help sustain the solemnity of trial, and that virtualization alters these cues (Jeutner 2024; Flower 2025). This research supports the narrower proposition that presentation shapes the experience of authority; it does not create legal authorization.

Visibility carries a second direction as well. Judicial imagery and open courts give justice public form, while simultaneously exposing authority to observation, record and critique (Resnik & Curtis 2011). Visual law should therefore study not only how authority uses image to win respect, but also how image reveals ruptures in authorization: who is excluded from the frame, who may not speak, what evidence cannot enter the record, which gestures are performed under duress. Contestability thus becomes the bridge between visual research and rule-of-law judgment. Lawful authority must not only be capable of being seen, but must allow its reasons, evidence and powers to be seen and challenged.

The contribution of *Farewell My Concubine* is therefore not to prove that law is essentially performance, but to expose the possible misalignment between performative form and legal boundary. Opera-school training embeds a norm in the body; the stage renders that body recognizable as a role through spectatorship; the struggle session reassembles role, procedure and audience once judicial safeguards have been withdrawn. The visual grammar of judgment can cross institutional boundaries; authorization and contestability cannot be acquired by imitation.

[F] CONCLUSION

Farewell My Concubine makes visible the bodily conditions often hidden within authority. The pipe-correction scene traces how a norm is pressed into recognizable speech and posture through repetition, punishment and peer surveillance. The stage scene locates a role's credibility in the joint work of performer, convention and audience. The struggle session then exposes how role differentiation, procedural sequence, fact-production and

public sanction can persist even after the appearance of judgment has been severed from judicial authorization.

The analysis yields two conclusions. First, formal authorization and embodied social legibility jointly shape the public experience of authority, but neither substitutes for the other. Second, the portability of the visual grammar of judgment is both a resource for presenting legal authority and a risk of appropriation by non-legal power. Robe, posture, interrogation and silence cannot determine whether a performance of power belongs to law. One must also ask who authorized it, on what evidence, whether defence and reasons were available, and whether the decision can be reviewed. Visual law's critical potential lies not only in showing how authority becomes visible, but in testing whether visible authority can be contested.

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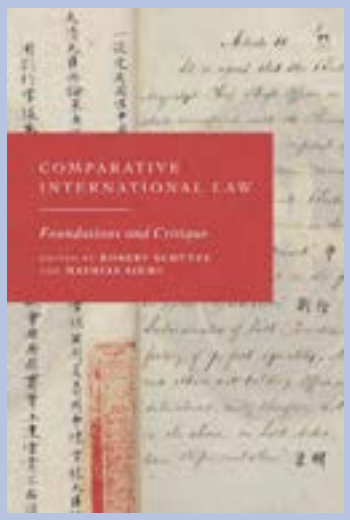
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Legislation, Regulations and Rules

International Covenant on Civil and Political Rights 1966, Article 14.

Comparative International Law: Foundations and Critique edited by Robert Schütze and Mathias Siems

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Robert Schütze and Mathias Siems (2025) *Comparative International Law: Foundations and Critique*, published by Hart Publishing, ISBN 9781509972395

What does it mean to compare international law? This is the central question posed by this edited collection, which emerges from a collaborative project between the Durham Global Policy Institute and the European University Institute. The editors' ambition is to move beyond individual national case studies and interrogate instead whether distinct "legal families" of international law exist, and to explore the mechanisms of legal transfer—both vertical and horizontal—through which similarities between international systems are created (v-vi).

Yet the volume's opening chapters reveal a tension within this ambition. The introductory chapters offer taxonomies and historical reconstructions that seek to define and delimit the field; the regional chapters provide rich, often contradictory, case studies that resist such neat categorization; and the critical concluding section systematically questions whether the field's foundational premises can hold. The book's greatest contribution, I found, lies not in the framework it proposes, but in the tensions it generates: tensions that invite the reader to ask whether comparative international law is a discipline, a method, a convenience of language, or perhaps a critical practice that, by its very nature, resists neat definition.

Mathias Siems opens with a comprehensive state-of-the-art survey, tracing the rise of the term "comparative international law" through Google Scholar metrics and proposing a ten-category taxonomy divided into vertical and horizontal variants. This is, on its own terms, an instructive exercise, helpfully mapping the types of comparisons being undertaken and their subcategories. Yet one wonders whether the taxonomy risks mistaking a heuristic device for substantive reality. Siems acknowledges that critics challenge the relevance of broad country groupings (21), but he does not fully address the deeper worry: that the act of categorizing imposes a particular rationality onto messy, hybrid, and contested legal realities. Siems's categories undoubtedly organize an expanding literature, but it is less clear that they identify analytically distinct phenomena. The chapter's use of quantitative indicators of field emergence—Google and Google Scholar hits—reinforces this concern: is the taxonomy responding to a qualitative transformation in the study of international law, or to a proliferation of scholarship that now requires disciplinary management?

In Chapter 2, Robert Schütze's historical reconstruction recovers the work of William E Butler, whose international systems approach—focusing on regional or ideological families—Schütze champions as the proper foundation for comparative international law. Schütze traces this genealogy from Robert Ward in the eighteenth century through Butler's Hague Lectures in the 1980s, offering a historical account that corrects what he sees as the "historical amnesia" of the post-2011 scholarship (43). Yet Schütze's inheritance of Butler comes with formalist assumptions that shape his definition of the field. He endorses Butler's view that national approaches "should categorically be excluded" (46), though his own formulation is slightly more nuanced: comparative international law, he writes, concerns:

> the identification and analysis of similarities and differences among regional or specialized systems of international law (horizontal comparison) or between them and general international or national law (vertical comparison), whereby at least one unit of comparison is international or supranational in nature (48).

This is a methodological choice that privileges systems over actors, juridical order over practice, and doctrinal coherence over empirical diversity. Schütze's critique of the approach advanced by Anthea Roberts (Roberts & Koskenniemi 2017; Roberts & Ors 2018) follows from this framework: centring national courts and academics either presupposes one underlying universal international law or, in its constructivist form, risks denying international law's legal character (45). This is a substantive argument, but risks mischaracterizing Roberts' own pluralism: her project

is not to assume universalism, but to reveal the diversity of national interpretations; the dilemma Schütze poses is therefore, in part, of his own making.

Arguably, Schütze's own framework, by refusing to treat national receptions of international law as comparative international law proper, reproduces at the methodological level a boundary-making gesture that his historical narrative elsewhere teaches us to treat with suspicion. The irony is that the chapter makes visible the contingency of international legal systems—their emergence through empire, ideology, translation, coercion and institutional struggle—while its methodological conclusion tends to stabilize those systems as bounded juridical objects. The difficulty is not that Schütze ignores social construction; he plainly does not. Rather, once a formation is recognized as an international legal system, the comparative task becomes one of identification and comparison, rather than inquiry into the actors, practices and contestations through which such a system comes to be recognized as law.

His brief discussion of the Chinese empire (33-34) illustrates the risk. Drawing on John King Fairbank, Schütze presents a unified hierarchical order of "superordination-subordination" (34) underpinned by the emperor's universal supremacy. This view, while capturing the official ideology of the centre, flattens more complex realities on the peripheries, where rules were translated, negotiated, and at times contradicted. Post-Fairbank scholarship has challenged the totalizing implications of the Sinocentric model: border officials, local interpreters and regional actors adapted imperial norms in practice, producing hybrid legal practices that sat uneasily with the orthodox narrative aimed at domestic audiences (Kellam 2015: 18-29). A systems framework can therefore privilege the centre's juridical self-description over the contested practices through which inter-polity norms were actually produced. Indeed, as Part II of the volume later demonstrates, this exclusion of national approaches is difficult to maintain.

Taken together, the two introductory chapters reveal a central tension in the volume. Siems offers an expansive taxonomy of comparative international law, while Schütze proposes a narrower, historically grounded definition centred on international systems. Both approaches are valuable, but both stabilize the field: Siems by organizing its proliferating forms of comparison, Schütze by delimiting its proper subject matter. The volume's framework thus raises a deeper question: what must be organized, prioritized or excluded so that comparative international law remains recognizably international and recognizably law. At times, especially in

Schütze's reclassification of national approaches as comparative foreign relations law, this taxonomic impulse reads defensively: it preserves the normative autonomy of international law against collapse into comparative foreign relations law or national legal sociology. Yet the case for that defensive posture is not fully developed. As Saïda El Boudouhi later argues (chapter 8), drawing on Pierre Legrand, comparative law can "subvert the great positivist [formalist] machine by placing grains of sand in its cogs" (201, quoting Legrand). In chapter 10, Horatia Muir Watt develops the same point in decolonial terms: comparison always presupposes metrics, and those metrics frequently carry hidden assumptions about civilization, progress, legal maturity and alterity. These critical perspectives, to which I return below, show that the taxonomic ambitions of Part I are more politically charged than they first appear. The opening chapters leave this more disruptive conception of comparison largely unexplored.

Part II of the volume tests the framework announced in Part I and, in important respects, exceeds it. Its chapters do not simply populate that taxonomic framework; they compare different kinds of objects altogether: regional practices, national strategies, methodological traditions, hegemonic projects and juristic orders. The result is illuminating precisely because it is unruly: the case studies resist neat categorization, exposing the limits of Part I's conceptual architecture while also demonstrating what comparative analysis can achieve when freed from taxonomic constraints.

Kehinde Folake Olaoye (chapter 3) revisits the contested genealogy of "African international law" (AIL), from early twentieth-century dismissal by scholars such as Scott Brown through decolonization and contemporary regionalism. Olaoye acknowledges the colonial baggage of "African law" as an ethnographic construct but uses comparative method to identify distinctive regional practices in treaty ratification, custom and regional adjudication. The chapter's key move is away from the search for a singular, exceptionalist AIL toward plural "African approaches to Africa's international law problems" (70). In doing so, it both fits and unsettles Part I: Africa appears to offer the kind of regional field that a systems approach might accommodate, yet Olaoye shows that this field is constituted by overlapping continental, subregional, national and mixed legal traditions that do not resolve into a single coherent legal family.

Ríán Derrig's chapter on "American" international law is among the strongest contributions (chapter 4). Tracing American anti-formalism from classical pragmatism to the New Haven School and contemporary liberal internationalism, Derrig shows that the relevant unit of comparison is not

a geographical legal family but a methodological tradition: a pragmatic, policy-oriented and antiformalist style repeatedly mobilized in service of American power. Crucially, Derrig shows that anti-formalism has variable political valences: it may enable United States military projection in use-of-force debates, while the politics of formalism and antiformalism shift in expropriation and investment contexts. Derrig is therefore not comparing rules, institutions or states so much as epistemological styles. His chapter reveals that the politics of legal method are at least as salient as the geography of legal families.

Ge Chen and Ming Ma Du's chapter on China's contemporary approach (chapter 5) is instructive precisely because it does not fit the volume's framework. The authors adopt a national approach to international law, noting that the comparative international law movement has not widely extended to China and that a "scholarly withdrawal into national approaches" is more realistic when studying China (98). Yet China's reception and adaptation of international law are central concerns of comparative international law. The chapter thus exposes a boundary problem: China is indispensable to any comparative account of contemporary international law, but it enters through the national-approaches lens that Schütze would relegate to comparative foreign relations law. Substantively, Chen and Du trace China's trajectory from nineteenth-century recipient of Eurocentric international law, through Soviet-influenced socialist international law, to post-1978 engagement and Xi-era norm-shaping. They characterize China's contemporary approach as sovereignty-centred and instrumentalist: embracing international law where it advances interests, resisting norms that constrain sovereignty. The chapter's most interesting claim is that China's approach exceeds "authoritarian international law" and shades into an "international law+" project (120). Yet it also exposes a limitation of the Part I framework: its exclusion of national approaches means it cannot accommodate an analysis that straddles legal doctrine and official discourse.

In Chapter 6, Max H Mayer offers a dense intellectual history of nineteenth-century German international legal positivism and its construction of a distinctively European international law. He traces the shift from natural law universalism to its Hegelian synthesis in Johann Bluntschli. This tradition, he argues, did not simply restrict international law to Europe but redefined universality itself: European legal forms were presented as civilizations' historical culmination, while non-European societies were excluded and re-integrated only through a teleological narrative of future development under European tutelage. For Mayer, then, the European tradition is best understood not as one legal family

among others, but as a hegemonic project whose exclusions comparative international law now seeks to redress.

Bringing Part II to a close with chapter 7, Ayesha Shahid reconstructs the eighth-century juristic tradition of As-Siyar as a sophisticated body of law governing relations between Muslim and non-Muslim polities, covering treaty obligations, conduct of war, diplomatic immunity and peaceful dispute settlement. The chapter also considers the Organization of Islamic Cooperation and League of Arab States, noting their limited effectiveness in contemporary dispute resolution. It serves as a counterpoint to Eurocentric histories of international law, though its inclusion also raises the question of why some non-Western traditions are selected for comparative treatment while others remain absent.

If Part I sets out a project and Part II tests it against unruly cases, Part III systematically questions whether the project can hold.

El Boudouhi, in chapter 8, argues that comparative international law is, at best, a linguistic convenience: what is usually compared is not international law itself, but national receptions of international law, properly understood as comparative foreign relations law. When domestic judges refer to foreign case law in interpreting treaties, they are not necessarily doing comparative law in the scientific sense; they may simply be applying international law's own rules of recognition. The chapter's real contribution lies in its call for methodological discipline: a critical, reflexive approach to foreign law that exposes the choices available to judges. This is a more modest, but arguably more defensible, claim than the taxonomic project advanced in Part I.

Ugo Mattei and Avi Singh offer the volume's most polemical contribution (chapter 9). The authors argue that comparative international law is necessary because post-1991 claims of Western legal universalism suppressed alternative visions of international law, including Soviet international legal thought. Gaza, Ukraine and institutional paralysis are used as evidence of a terminal crisis in the existing order. The chapter concludes by identifying the Association of Brazil, Russia, India, China, South Africa, Egypt, Ethiopia, Indonesia, Iran, and the United Arab Emirates (BRICS) as a possible site of alternative international legal futures. The discussion of sovereign debt, investment law and economic sovereignty is suggestive, but BRICS often appears less as an object of sustained comparison than as a symbol of counter-hegemonic possibility. In doing so, it risks treating the weakening of Western hegemony as itself evidence of a more plural or emancipatory international law.

Muir Watt, in Chapter 10, offers a decolonial critique of the metrics that underwrite comparison, especially in private international law. Her central claim is that apparently neutral categories—"development", "progress", "*ordre public*"—carry embedded assumptions about time, civilization and hierarchy. The chapter is significant for the volume because it challenges the idea that comparison can be a merely technical exercise: every comparative project depends on metrics, and those metrics are never innocent. It therefore speaks directly to the book's opening taxonomies.

In Chapter 11, Petra Minnerop offers a constructive example of comparison beyond state-centred categories, using science as a *tertium comparationis* across global commons regimes. By comparing how treaties rely on "best available science", the chapter shows that comparative international law need not be organized around legal families or regional traditions, although it does not fully engage the critical questions about power and epistemology raised elsewhere.

Marta Infantino identifies global indicators and rankings as among the most consequential comparative exercises in contemporary global governance (chapter 12). Her chapter exposes a major blind spot in both comparative law and international law: lawyers have often ignored quantitative comparison precisely where it is reshaping legal and institutional behaviour most powerfully.

Jaakko Husa concludes by distinguishing global law as a universalizing normative field from global law as a process of legal globalization (chapter 13). The distinction is useful because it captures a tension running through the volume as a whole: comparative international law oscillates between description, critique and normative reconstruction without finally choosing among them.

Comparative International Law is a volume of considerable intellectual vitality, but its vitality lies precisely in its internal contradictions. The editors seek to impose order through taxonomy and historical definition; the contributors, at their best, reveal why that order remains elusive. The opening chapters set out a framework that is complicated by the regional case studies and further unsettled by the critical chapters in Part III.

Three observations follow. First, the volume demonstrates that the question of what comparative international law is cannot be separated from how one compares. Derrig (chapter 4) shows that comparing methodological traditions yields different insights from comparing geographic families; Muir Watt (chapter 10) shows that comparison always involves metrics; Infantino (chapter 12) shows that consequential

quantitative comparisons are already reshaping global governance whether lawyers acknowledge them or not. The volume does not resolve these methodological tensions, but it does illuminate them.

Second, the selection of traditions reveals the framework's limits. Mayer's account of European international law shows that Europe was not merely a legal family but a hegemonic project (chapter 6). Shahid's chapter on Islamic international law (chapter 7) demonstrates the importance of non-Western juristic traditions. But it also exposes a selectivity that is difficult to justify: Hindu, Buddhist, and Confucian legal traditions all developed substantive bodies of norms governing inter-polity relations, yet none receives sustained attention in the volume. This omission is particularly striking given that comparative law scholarship has long subjected the very taxonomy of religious legal families to searching critique (Huxley 2002: 8-16)—a critique that the volume's taxonomic ambitions might benefit from engaging. This omission extends beyond religious traditions: why China but not Japan, India or Southeast Asia? Most strikingly, Indigenous legal orders remain largely outside the volume's map, despite their significance in areas such as traditional knowledge, genetic resources, environmental governance, climate law and free, prior and informed consent.[1] No edited collection can be fully comprehensive, but a taxonomic project that seeks to define the field might benefit from reflecting on its own exclusions and their implications for how comparative international law is conceived.

Third, the volume's greatest contribution may be that it leaves unresolved the question it poses. It invites the reader to ask whether comparative international law is a discipline, a method, a convenience of language, or a site of contestation over what counts as law and who gets to compare it. On the evidence of this collection, it is all of these things simultaneously. The lack of resolution is not a weakness, but a productive condition of inquiry.

For anyone interested in these debates, the volume offers an indispensable map of the field's fault lines, even if its own boundaries remain contested. It is most valuable not for the framework it proposes, but for the questions it leaves open: questions that will likely occupy the field for some time.

[1] See, eg, the 2024 World Intellectual Property Organization (WIPO) Treaty on Genetic Resources and Traditional Knowledge; the Nagoya Protocol on Access and Benefit-sharing; and the Inter-American Court's decision in *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001). The Whanganui River settlement in Aotearoa New Zealand—which granted legal personhood to a river—similarly illustrates how a domestic legal innovation can influence international discussions on the rights of nature.

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Legislation, Regulations and Rules

Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, entered into force 12 October 2014) 3008 UNTS 3

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ)

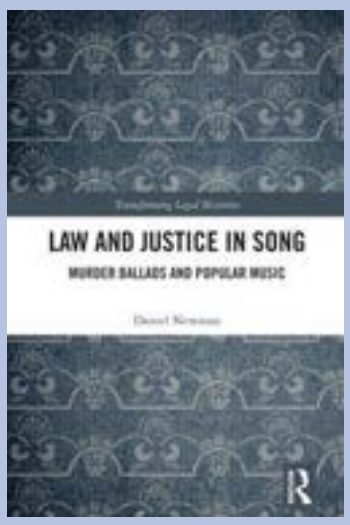
Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (adopted 24 May 2024) (WIPO)

Cases

Mayagna (Sumo) Awas Tingni Community v Nicaragua, Inter-American Court of Human Rights, Series C No 79 (2001)

Law and Justice in Song: Murder Ballads and Popular Music by Daniel Newman

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Daniel Newman (2026) *Law and Justice in Song: Murder Ballads and Popular Music*, published by Routledge, ISBN 9781032964836

Daniel Newman's *Law and Justice in Song: Murder Ballads and Popular Music* is an interdisciplinary study of the murder ballad as a cultural output through which we can learn how society engages with death, killing, and, through that, with social issues we attach to them such as discrimination, grief, memory, and justice at large. The premise that underpins this project is that death, killing, and murder "are foundational subjects in song as these emotive topics—at once universal and particular—occupy artists from place to place, and across generation to generation" (1). We need to engage with the topics of death, killing, and murder as part of our ongoing endeavour to make sense of our mortality and violence. These themes, Newman suggests, are simultaneously universal and contextual, appearing across places, cultures, and generations (1). He writes:

> As social creatures, humans need to engage in dialogue about such heavy, disorientating subjects, whether it is to share the burden or just make sense of it all. More loftily, we might try to render beauty out of tragedy … All such endeavours can be cathartic and liberating. (1)

Newman defines murder ballads broadly as songs concerned with death and killing (4). Some murder ballads recount historical crimes and therefore possess a documentary quality; others are entirely fictional. What unites them is their capacity to "offer avenues of existential contemplation and questioning of how these matters [death and killing—KLM] relate to a range of wider experiences" (5). In that, the book's objective is rather ambitious as it seeks to use the murder ballad as a lens through which to explore how we understand death and killing in society (263).

One of the book's most compelling methodological contributions to the field is its insistence that songs are better understood as performances rather than merely texts. Newman's approach draws heavily upon close reading of the lyrics, but avoids reducing songs to their lyrics alone. He observes that "the words are part of a fuller whole" (43) and insists that "we must take some interest in the performance" (43). Newman therefore combines a close reading of the lyrics, with attention to the artist's identity, performance style and tone, the musical atmosphere, and the broader context through which songs acquire meaning (43).

At its strongest, the book demonstrates how murder ballads provide what Newman describes as "a resource for getting at how people understand their lives" (283). Rather than focusing solely on legal responses to violence, he seeks to understand the nuance of how "ordinary people" experience and perceive death, killing, and murder, how we negotiate mortality. Newman presents murder ballads as a form of subversive legal history grounded in social and cultural experience: they reveal social understandings of violence that emerge outside of formal legal institutions. The book's intervention is critical, Newman argues, because it does not centre law, but rather recognizes that law operates at the margins of broader social understandings of death and killing. In that, the book holds considerable value as a work of socio-legal scholarship that occupies an intriguing interdisciplinary position between the study of law and popular culture, the study of law and music, and the study of law and literature.

Yet, a productive tension emerges early on and runs throughout the text. Although Newman frequently gestures towards the limitations of centring legal discourse in understanding the human experience, the book frequently turns to the law as a primary lens. Indeed, Newman acknowledges that "death is co-opted into the realm of law" (18) and argues that "the law has, then, a conspicuous role in death and killing. It tends to take over and force a legal lens onto the experience" (18). On occasion, the book appears complicit in this process of co-option, or, at least, it replicates the seeming inescapability of the law. For instance,

when Newman contends that previous scholarship has often left the legal implications of murder ballads implicit, his own effort seems to risk reproducing the very legal centrality he questions earlier on. This is not a flaw because, as Newman writes, there is benefit to combining the historical, cultural, and legal aspects, as the book does; the book is thus a study that oscillates productively between legal analysis and broader cultural interpretation.

Acknowledging the variety of ways to deal with death and killing, the following chapters are organized around thematic lenses for murder ballads. The first couple of such chapters explore morality, revenge, and bigotry. In discussing morality, Newman examines songs that frame murder through notions of right and wrong, where "lessons must be learned" (60), "consequences need to be faced," (60) and "moral lessons [are] being taught" (82). Particularly compelling here is the consideration of revenge narratives, where "murder [is] evoked in the need for revenge" (63), especially those in which women respond violently to abusive men. These examples allow Newman to articulate how certain murder ballads function as forms of "feminist jurisprudence" (75). The following chapter extends his concern with gender by examining misogyny and femicide. Through a gendered reading of the murder ballad, the form emerges as one of the cultural ways through which discriminatory assumptions are reproduced (105).

Through analyses of songs addressing racism, the lynching of Black Americans and fatal police brutality against them, as well as the Black Lives Matter movement, the chapter "Means of Resisting Inequality" demonstrates how murder ballads can function as tools of mobilising protest and fighting racial inequality. This chapter shows how songs concerned with death and killing can facilitate collective resistance and demand social justice. In doing so, this chapter exemplifies the political potential of the murder ballad and highlights the broader importance of analysing popular music as an object of socio-legal critique.

Equally powerful is "Tribute and Memorial," where Newman explores the role of music in shaping collective memory and how murder ballads are used "to commemorate those who have been impacted by killing, most obviously the victims whether those be the person murdered or those wrongly accused" (155). One of the better-known songs in this category is Elton John's "Candle in the Wind," a tribute to the death of Princess Diana. Popular music, he notes, can play a meaningful role, being "a way to express and channel emotion at a personal and public level" (134). Collective memory through music, therefore, "allows for shared grieving,

and cultural forms can be integral to the process of developing and enabling a shared experience" (134). Newman's discussion of "Streets of Sorrow/Birmingham Six" is especially evocative, where he demonstrates how music can rally communities through shared experiences of injustice and suffering (148).

"Gallows Humour" provides an interesting angle in the context of legal scholarship. The chapter examines murder ballads that are "bleakly funny" and intended to elicit laughter (181). Here Newman argues that humour has been "often overlooked" in studies of law and literature because scholars tend to focus on the seriousness of the law. The murder ballads analysed in this chapter are perceived as "black comedies". Depicting distressing situations "in benign conditions such as entertainment," he argues, can provide audiences with mechanisms for coping with anxiety and tension (203). Yet, he notes, black comedies should be taken seriously. In doing so, the chapter occasionally reproduces the tendency it critiques. At moments, the analysis appears to take humour too seriously, interpreting it through "serious" legal frameworks rather than centring the (very serious!) art of humour.

The final substantive chapter, "Faith," investigates how murder ballads engage religious understandings of death. The notion of salvation, Newman argues, can provide reassurance in the face of mortality, helping us cope with existential uncertainty (257). His examination of Christian narratives of sacrifice and redemption in murder ballads leads him to suggest that without the story of Jesus and associated "Christian ideas" of redemption, "murder ballads would have no source" (237).

Where there has been much "law and" scholarship on literature, music, theatre, and film, this book takes on a historical analysis of the murder ballad as a way through which "we can understand how death and killing in song have a function in dealing with the world around us" (14). Newman urges us readers to "respect and value" these songs as sources of knowledge, and he models this approach. Newman's analysis is consistently thoughtful, wide-ranging, and rigorous, attending diligently to material that is emotionally and politically weighty. The songs are treated as meaningful cultural artefacts capable of revealing how we understand violence, suffering, responsibility, and loss. The book indeed demonstrates that songs about death and killing are meaningful social texts that reveal how communities confront some of the most difficult aspects of human existence.

Newman concludes the introductory chapter by observing that "mortality is a tough matter for people to tackle; dying is a messy business,

and homicide is always emotive" (32). The central question animating the book seems to be how artists make sense of these difficult realities. At times, however, Newman's interpretive desire to produce coherence appears to impose order on experiences that are fundamentally resistant to explanation (just like law itself does). Death, killing, and murder are senseless even if the law seeks to make sense of them, and some of the strongest moments in the book are those that permit pain, grief, and ambiguity to remain unresolved rather than shaped into analytical conclusions.

Ultimately, *Law and Justice in Song* is a rich and thoughtful contribution to the field. The book will be of considerable interest to scholars of law and popular culture, law and music, socio-legal studies, cultural studies, law and literature, and the legal humanities more broadly.

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What is Legal Argumentation?

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Abstract

Two new (or newish) books examine legal argumentation, the most recent being an edited work consisting of thirty-four chapters. The purpose of this article is to review both books—although much greater emphasis will be on the edited work—with the aim of discovering how useful the books might be for those researching into legal argumentation and reasoning. The article will argue that there are some basic shortcomings. The edited work focuses largely on what theorists have to say about legal argumentation—examples from the case law are limited (with one or two exceptions)—and so researchers will learn on the whole what legal argumentation ought to be rather than what it actually is. A second reservation, applying to both books, is that there is little or no interest in examining what legal argumentation and reasoning has been. This, arguably, is to be regretted because the past can tell us much about the present.

Keywords: analogy; argumentation; artificial intelligence; epistemology; logic; reasoning; rule-model; syllogism.

The question about what "legal argumentation" means is one that should, seemingly, be relatively easy to answer. Arguments have long been classified into a list of different kinds—arguments *a contrario*, *a fortiori*, *a pari*, *ad hominem* and so on—and thus one might list those that are acceptable in legal argumentation (for example an argument *a fortiori*) and those that are not (argument *ad hominem* for instance). No doubt a certain amount of commentary would need to be added, but a simple bilateral classification, valid and invalid, would surely be enough? Of course, this is not the case at all, and that is why two recent books on legal argumentation—one very recent (Duarte d'Almeida & Ors 2025), the other relatively so (Rouvière 2023)—need well over three hundred pages to discuss the topic. What makes the subject of legal argumentation so complex is that it finds itself caught within a number of ontological and epistemological tensions. For example, there are tensions between an internal and external view, between diachronic and synchronic

approaches, between empirical and normative assertions and between realist and idealist analyses (plus no doubt other tensions). This review article, focusing in particular on one of the books mentioned (Duarte d'Almeida & Ors 2025), will argue that the book, while not irrelevant for those researching into (or learning about) legal argumentation and legal reasoning (associated with legal argumentation) fails to reveal much about, dare one say it, legal argumentation.

[A] INTRODUCTION: DISTINCTIONS AND DEFINITIONS

One obvious starting point are the established definitions, but associated with such definitions are also distinctions. Is legal "argumentation" to be distinguished from legal "reasoning"? Normally, the two are distinguishable in that argumentation usually involves another person to whom the argument is addressed, while reasoning does not necessarily involve another person even if, in practice, reasoning is usually aimed at an audience. More generally, it could be said that argumentation is about convincing whereas reasoning is about justification. According to the editors of the 2025 book, legal reasoning "is often used in a specific sense: to refer to the mental process of inferring a conclusion from what the reasoner takes to be reasons that support it", while argumentation "refers to a social and communicative practice: that of giving others what the arguer takes to be reasons in support of a conclusion". As they say, it "typically involves the activity of arguing *with* others, though you can also argue with yourself" (2025: 2).

Professor Rouvière is more ambiguous about the distinction. He writes that "argumentation is at the heart of legal reasoning" and that all those involved with the law—advocates, notaries, commercial lawyers and university professors—arrive at their conclusions on the basis of legal arguments which provide the reasons justifying the choice of their respective positions. "These reasons", he says, "are the arguments, that is the statements which justify the solution one brings to a legal problem" (2023: 3). His objective, accordingly, is to provide a descriptive analysis of legal argumentation which involves the breaking down of legal discourse in order to identify and to categorize the various arguments in turn permitting one to discover how lawyers should reason. His methodology, in terms of a scheme of engagement, is dialectic; it is to assess the dialectical tools employed by lawyers so as to anticipate the inherent uncertainty in legal debates (2023: 4). A dialectical *grille de lecture* permits him to merge argumentation with legal reasoning. In contrast, Duarte d'Almeida and

colleagues do not merge legal argumentation and reasoning, but they do accept "that one needs to reason well in order to argue well" which "is why much work done on legal reasoning is relevant also to the study of legal argumentation" (2025: 2).

One should perhaps add that distinguishing between argumentation and reasoning in law does make some institutional sense. In the common law world it could be said that lawyers acting as counsel argue, while judges, in their judgments, reason. The two perhaps merge in that quite often a judgement will reflect arguments presented by counsel and sometimes a judgment might specifically approve such an argument, in effect turning it into a form of reasoning. On other occasions an argument by counsel might prove "too much" (see *Blackpool & Fylde Aero Club Ltd v Blackpool BC* 1990). Another institutional difference between reasoning and argument, as Stefan Goltzberg notes, has its origin in the work of Aristotle: there is logical reasoning in which a solution is arrived at through unimpeachable inference—and thus there is no room for any argumentation—and there is dialectical argumentation in which a solution is reached only as a result of the argumentation itself (Goltzberg 2021: 7-8). Argumentation, in other words, implies discord and it is this discord which acts as the causal basis, one might say, of why there is an argument; reasoning, in contrast, does not of itself imply discord (2021: 8-9). Perhaps it is here that the fundamental tension is to be found between legal reasoning and legal argumentation.

A second distinction is between a legal argument and an ordinary argument. As Goltzberg has observed, it is by no means evident that there exists an argument that is typically legal. The premises upon which the arguments are based, he says, are clear enough, but what of the arguments themselves? It seems in the end to be a question of degree and that the form itself of arguments do not appear to be fundamentally specific (Goltzberg 2013: 4). However the ontological basis of Goltzberg's explanation of a legal argument is the rule-model (*la régle*) and rules possess, he says, two characteristics (2013: 1-3). These are a certain degree of generality and a certain degree of formality, both of these characteristics endowing the application of these rules with a legal specificity. Moreover, a rule-model ontology implies interpretation which in turn "gives rise to a type of negotiation in which legal interpretation is one of the central parts" (2021: 7). In other words there is a meeting between hermeneutics and dialectics, between interpretation and argumentation.

This coming together of hermeneutics (interpretation) and dialectics (argumentation) is expanded into a major treatise by Professor Rouvière.

This professor develops in much more detail some of the points identified by Professor Goltzberg. Again referencing Aristotle, Rouvière notes three different approaches to argumentation: there are rhetorical, logical and topic arguments, all three being found in law, although, he says, the need for rationality tends to put the emphasis on logical (syllogistic) arguments (2023: 6-7). The difference between these three types of argument is that the first (rhetorical) is based on emotion, the second (topic) on reasonableness and the third (logic) on rationality; it is a matter of pragmatism, methodology and dogmatics (2023: 8). There is an important historical dimension to these different kinds of arguments in that the first two are a characteristic of Roman and medieval civil law while the third is associated, historically, with the *mos geometricus* of the natural law school during the seventeenth and eighteenth centuries and the German Pandectist school of the nineteenth century (2023: 10). Another key point that Rouvière makes in the introductory chapter is the role of precedent, which may seem strange to those lawyers who think that precedent is a feature of the common law tradition and not of the civil law. But, as he points out, if one is to understand the role of argumentation in law it is vital to look at the case law (*jurisprudence*); and when one does this the role of precedent then becomes evident.

Duarte d'Almeida and colleagues' book is of course different from Rouvière's in that it is an edited work and thus, with regard to coherence and coverage, cannot really be compared in terms of a comprehensive taxonomy and rigorous coverage. However, it does divide legal arguments into five broad sections: these are elements, types, logics, theories and judging well. And whatever one might think about this broad classification it ought seemingly to permit the possibility of thinking about legal argumentation from a range of ontological and epistemological viewpoints. However, one might reflect that missing from this broad classification is a section, which could have formed the first part of the book, on the topic of what legal argumentation—and indeed legal reasoning—has been. A diachronic approach would surely permit, as Rouvière hints (but does not really develop), an important insight into how the different ontological and methodological schemes of engagement evolved over the centuries and what this evolution has bequeathed to modern legal thinking. Modern legal thought is a product of the past (see further Jones 1940; Samuel 2022).

[B] COMPLEXITY

A diachronic approach might also be of help in unpacking, so to speak, the complexities surrounding legal argumentation and reasoning. What are these complexities? The first concerns the researcher. They must decide whether they will adopt what might be termed an internal view—perhaps one might say a doctrinal approach—or an external view, this latter using methodological and epistemological frameworks that have been fashioned in disciplines other than law. An internal view typically revolves around the standard reasoning techniques of induction, deduction and analogy together with a limited number of interpretative approaches when the law in issue is a statutory text. An external view will certainly prove challenging as a glance at the social science literature devoted to methodology and epistemology would soon reveal (see for example Herman 1988; Berthelot 2001). Yet, even an internal approach can prove that one might have to go beyond the standard reasoning techniques if a scholar really wishes to say something new about the reasoning to be found in the law reports. There are what might be termed ontological and epistemological questions.

A second complexity also concerns a choice to be made by the researcher. Such research about legal reasoning can be either descriptive—this is what legal reasoners actually *do*—or normative, this is what legal reasoners *ought* to do. Often this latter kind of scholarship is presented, either expressly or impliedly, under the label "theory". The writer has a "theory" of legal reasoning and (or) argumentation. And this raises a further question. To what extent is such a theory of legal reasoning governed by a theory of law itself? Interestingly, it has been argued that much legal theory today is positively unhelpful with regard to the epistemological challenges facing those wishing to understand doctrinal scholarship, such scholarship embracing *inter alia* legal reasoning and argumentation (justification): "it has no bearing on the outcome of interpreting the law in pure doctrinal terms" (Bódig 2021: 12). Certainly many of the positivistic legal theories to be found in the books on jurisprudence do not offer much insight into the methods (defined widely) employed by lawyers and judges when they argue and reason (a point that is perhaps confirmed, if not intentionally, by Euan MacDonald in Duarte d'Almeida & Ors 2025: 287-406). And those theories asserted by some realists such as Jerome Frank (1949) and by idealists like Ronald Dworkin (1986)—theories that embrace the judge as law-maker—while offering more information yet provide only limited, even if valuable, insights. Dworkin offers, it might be argued, a theory of how common law judges ought to reason, but not a theory of how they do reason.

In addition to the positivistic theories, there are theories whose foundation is rooted not just in law but in other disciplines, the law and economics school being one leading example (see Jones 1940: 235-269). What is the impact, if any, of these other disciplines on legal argumentation? In answering this question much will depend upon the scheme of engagement a lawyer or judge might adopt in interpreting a statute, a set of facts and (or) a series of precedents. A judge adopting a functional scheme—that is an engagement that emphasizes the consequence of this or that interpretation—might well have regard to the economic consequence (Rouvière 2023: 22). There are certainly cases in the common law world where such an economic influence is more or less manifest. The complexity here, as indicated, is that the decision reached by a judge or judges might depend upon a functional *grille de lecture* rather than, say, a structural one bringing into play the epistemological importance of social science methodology (see further Muir Watt & Samuel 2026). Yet, a further complication is that the actual argumentation and reasoning might not focus directly on the economic consequence—it is just there in the background. The apparent scheme employed might well be one that "manipulates" (one might say) legal concepts in such a way that it is these legal concepts that seemingly provoke the decision. Perhaps the major challenge, then, is that to furnish a comprehensive account of how judges actually reason one must move between so many levels; one must move between theory, method, vocabulary, psychology (see below) social policy plus, no doubt, the influence of other disciplines such as economics

A third complexity, especially one facing comparative lawyers, concerns the access to legal argumentation and reasoning. In the common law systems such access is traditionally quite straightforward in that each judge often renders, in whatever court, their own judgment and this is fully discursive setting out, often in some detail, the facts, the arguments of counsel (to a greater or lesser extent) and the reasons for arriving at the decision. This has not been the situation in other countries such as France where a metaphorical distinction has been made by the comparative law jurist Mitchel Lasser between an "official portrait" and an "unofficial portrait" (Lasser 2004). A legal tradition might for example present legal reasoning as a highly formalized process (official portrait) while the reality reveals something rather different (unofficial portrait). How does one go about discovering such an unofficial portrait? Professor Lasser explains that this involves the seeking out of the opinions of the advocate-generals and the reports of the reporting judge, for these opinions and reports read more like common law judgments.

A fourth complexity involves lawyers and judges as human beings. Because they are human, this generates a conundrum: does one focus on the reasoning of say individual judges or does one focus on the judiciary as a class? And, if the latter, are there different classes of judges? Do for example first instance judges reason differently from appeal judges? If it is a matter of individual judges, should researchers be researching the social and educational backgrounds of each and every judge (see for example Graham 2025)? More generally, this takes one back to theory. Should legal argumentation and reasoning be approached as a matter of social psychology, individual psychology or what? A psychological theory of law, it must be stressed, is not uniform in nature; there are many different approaches and focal points (see Jones 1940: 187-202). It is, for example, relevant in what might be termed a judicial "hunch" approach to deciding cases, just as it is relevant to research into feminism and legal reasoning (see Cowen & Kennedy in Duarte d'Almeida & Ors 2025: 465).

The general point to be made is an ontological one. When one talks of legal argumentation and reasoning, where is the focal point, that is to say the "thing" that "exists" upon which one can base an explanation—a thesis perhaps—as to the nature of such argumentation and reasoning? Is this "existing thing" (*res*) separate from the human mind (*intellectus*)? And if so, what is it? Is the existing thing a body of rules, previous cases, rights, interests, conceptual models of relations or legal institutions or what? And what of arguments themselves? Is there an ontology of different types of argument? These are, of course, just some of the issues generating complexity; there are others.

[C] CLASSIFYING ARGUMENTS

Is there, to develop the question just posed, an ontology of legal arguments? There are certainly different types of arguments. The principal ones are set out below together with a factual situation based on Professor Goltzberg's "famous café" example (2013: 83). This famous café has a notice on the door stating that "dogs are prohibited from entering these premises".

- ◊ Argument *modus ponens*. This is the classic argument of deduction: if p, then q (see Stevens in Duarte d'Almeida & Ors: 299). And so if a customer enters the café with a small poodle the owner will simply apply the following argument against the customer: major premise: dogs are prohibited; minor premise: a poodle is a species of dog; conclusion: the customer is in breach of the prohibition.
- ◊ Argument *a similitudine*. This form of argument can be defined either as a kind of induction or, more commonly, as an analogical

argument (see Duarte d'Almeida & Zorzetto in Duarte d'Almeida & Ors 2025: 180). A client enters the café with a pet fox. The owner will argue that a fox is analogous to a dog and is thus prohibited; alternatively, the owner could assert that there is an implicit rule to be induced out of all the different kinds of animal that qualify as dogs and that such an inducted rule will apply to a fox given the evident similarities between dogs and foxes.

- ◊ Argument *a pari*. This form of argument is essentially the same as an argument a *similitudine*. A fox is similar (analogous) to a dog and is thus prohibited.
- ◊ Argument *a fortiori*. This is a very common argument and is founded on the notion that one goes from one situation to a stronger one (see Moreso in Duarte d'Almeida & Ors 2025: 227). A customer enters the café with a pet tiger. The owner will argue that if a dog is prohibited then something that is much more dangerous and much more of a nuisance than a dog is certainly prohibited.
- ◊ Argument *a contrario*. This is an argument that where a thing or form of behaviour is expressly prohibited the opposite is permitted (see Canale & Tuzet in Duarte d'Almeida & Ors 2025: 213). A customer enters the café with a cat, and when challenged by the owner, argues that in specifically prohibiting dogs the notice is implicitly permitting other animals such as cats. In fact, this argument reflects a form of logic that is commonly encountered: "No one under the age of 18 is permitted to enter this building" implies that people over the age of 18 are permitted to enter.
- ◊ Argument *ad auctoritatem*. This is an argument founded purely on the authority of the person or institution who (or that) has issued the assertion (see Miotto in Duarte d'Almeida & Ors 2025: 146). A customer enters the café with an animal that is not a dog and, when challenged by the owner, the customer might well reply with an argument *a contrario*. However, the owner might offer the counter-argument that as owner he has the power (authority) to order a customer not to bring any animal into his café. It is a "he who must be obeyed", or "the law is the law" (and he is the lawmaker), argument.
- ◊ Argument *ad absurdum*. This is an argument based upon a consequence that would amount to an absurdity if the assertion of the person against whom the argument is directed is to be accepted. A customer brings into the café a hen, the owner objecting and asserting that a hen is like a dog. The customer argues that if a hen is like a dog then it must follow that dogs cluck and lay eggs.

- ◊ Argument *ad consequentiam*. This argument is often associated with the argument *ad absurdum* in that the force of the argument is located in the consequence of any action or whatever being proposed by another person (Bellolio in Duarte d'Almeida & Ors 2025: 244). The argument is essentially summed up as: "if you do that, then the consequence will be …". A customer enters the café with her pet tiger and, when challenged by the owner, offers an *a contrario* argument. The owner might offer the counter-argument that the consequence of having a tiger in the café is that someone could be very seriously injured.
- ◊ Argument *ad passiones*. This is an argument based upon emotion, often used to gain the sympathy of the person against whom the argument is directed (see Del Mar in Duarte d'Almeida & Ors 2025: 499). A customer enters the café with a cat, and the owner challenges the customer with the argument that the cat reminds the owner of his beloved and now departed cat "Tibbins" and so would the customer be so kind as not to enter with a cat.
- ◊ Argument *ad hominem*. This is an argument aimed at the character of the person themself. In other words it is a personal attack and is often resorted to when all other arguments fail. Such arguments are frequently to be found in crude political discourse (especially today) and is regarded by many as lacking rationality or legitimacy, although this is not to suggest that such arguments are ineffective. A customer enters the café with a cat and, when challenged by the owner, asserts that the owner is a nasty left-wing worthless woke who loathes decent law-abiding cat lovers and thus should not be hassling customers like him.

This list of types of argument is not exhaustive but probably covers most of the kinds of argument to be found in the case law reports. Many of these arguments are, of course, based on standard reasoning techniques such as deduction, induction, analogy and policy (consequentialism), but evidently some might seem more rooted in emotion (see Del Mar in Duarte d'Almeida & Ors 2025). Nevertheless, even an *ad hominem* argument has some logic to it: major premise: one should not listen to unpleasant characters; minor premise: this person is an unpleasant character; therefore one should not listen to this person.

Most of these arguments are analysed, often in great detail, in the Duarte d'Almeida and colleagues handbook. And Professor Rouvière discusses in some depth the arguments *a fortiori* and *a contrario*. However, the two books are different in their orientation. The contributors to the edited book tend to focus much more on the philosophical and

epistemological literature devoted to the theory and analysis of reasoning and argumentation (with some exceptions) whereas the French work often cites legal texts of one kind or another. The problem—if it is a problem—in concentrating more on the non-doctrinal texts is that the focus is less on what legal argumentation and reasoning actually is but on what in theory it ought to be. Such a focus perhaps becomes more problematic if the diachronic perspective is ignored because what gets eclipsed is a fundamental dialectical tension that lies at the heart of legal reasoning. This is the tension between what might be described as "processing" and "thinking".

[D] LEGAL REASONING AS PROCESS

The notion that legal reasoning is a matter of process has roots going back to Gottfried Wilhelm Leibniz (1646-1716) who thought that in theory legal solutions could be made by a "calculating" machine capable of delivering solutions in a manner analogous to a mathematical calculation (Rabault 2024: 33-38). As Simon Deakin and Christopher Markou put it, "Leibniz believed that it was possible to develop a consistent system of logic, language, and mathematics using an alphabet of unambiguous symbols that could be manipulated according to mechanical rules" (Deakin & Markou 2020: 9). As these two authors go on to point out, this *mos mathematicus* thinking was founded on the idea that law as a body of knowledge was based upon axioms. Indeed, another jurist, Johann Heineccius (1681-1741), actually attempted to reduce the whole of Justinian's *Digest* to a series of axioms and theorems (see 1728) and this mathematical thinking was one of the epistemological beliefs underpinning the codification movement in Europe. There was also a political motivation. The idea that law was a matter of positive axioms permitted rulers to wrest legal reasoning from the tradition of Roman law and its corps of Romanists—a body of knowledge seen as largely independent from the control of rulers—and into the hands of the state. "The legal syllogism", writes a French professor, "is explained by the emergence of a supremacy of positive law through the rise of a law dictated by the state". Accordingly, "it was not only a means of rationalizing the law but of subjecting it to the political authority" (Rabault 2024: 40). Law was no longer a matter of juristic wisdom (a "secret science" says Rabault); it was a process based on algorithmic thinking, the means of delivery being the notion of a judge as robot.

This monotonal logical thinking was largely (but not completely) rejected during the twentieth century. As one French jurist asserted, "the passage from the general rule—or from a previous decision—to the solution of

the concrete case cannot be analysed in terms of a simple deductive application process". For "the subsuming of the factual situation under a rule involves the intervention of multiple circumstances, elements and variables which prevent any claim to predict with certainty its result" (Atias 1994: 119). If one sees monotonal logic based upon a conceptual structural model—thus the traditional importance of coherence in legal argumentation and reasoning (see Michelon in Duarte d'Almeida & Ors 2025: 197)—this model gave way, at least to some extent, to other models during the last century, in particular functional and hermeneutic forms of engagement.

Nevertheless, processual thinking regarding legal reasoning and argumentation has not disappeared. This is not surprising, of course. Syllogistic reasoning has a long tradition in the history of legal thought and arguments based on logic remain powerful. As Maribel Narváez Mora says in the Duarte d'Almeida and colleagues book, the "tools of non-deontic logics, including standard propositional and predicate logic, alongside those of informal logic, together with the development of computational models, seem to be largely effective for evaluating both the process and the results of legal argumentation" (2025: 278). One might add, of course, that no one wants to assert that legal reasoning and argumentation are illogical and so, as Katherina Stevens says in the same book, the goal of informal logic is "to demonstrate its usefulness for researching and teaching legal argumentation" (2025: 299). Such logic is informal, rather than formal, because it is "flexible and open to integrating insights from other theories, including formal logic, dialectics and rhetoric" (2025: 299). This kind of logic, says Stevens, is far more relevant to legal argumentation because the application of a legal rule or norm often requires interpretation. Monotonal logic—an inferential causal scheme one might say—gets defeated by the hermeneutical scheme. Dialectics also has a role in deciding whether or not the major premise employed in informal logic is, if not "true", at least "acceptable" by the audience (2025: 306); in other words the premise itself can result from argumentation. Stevens spends much of her chapter analysing the schemes and mapping of arguments which she claims provide an excellent analytical tool for students and researchers researching actual legal arguments used by lawyers and judgments. Not surprisingly she also thinks that it is Artificial Intelligence (AI) & law which is providing some of the most valuable insights into informal logic. One is back, then, to the algorithmic "formalization" of "informal" logic.

It is perhaps to be regretted that Stevens (or anyone else for that matter) does not bring into play many actual examples from the law. The emphasis

of much of the book, with some notable exceptions, tends to be on other theorists rather than legal practitioners and judges. This is unfortunate, even regarding legal reasoning as an inferential process, because such data from the legal reasoners themselves can reveal insights that do not necessarily emerge from a focus just on legal and philosophical theorists. Stevens might be more than happy not to dispute this, instead arguing that all such insights can be recast as informal logic. But can logic, formal or informal, provide an adequate tool for explaining even inferential legal argumentation?

[E] PROCESS REASONING AND THE COMMON LAW

One way of tackling this question might be to look at common law countries where traditionally the "life of the law has not been logic: it has been experience" (Holmes 1881: 1). Nevertheless can legal argumentation in the common law world be formalized to an extent that makes it amenable to computing and AI? Much depends on the ontological assumptions that underpin such argumentation and reasoning. Process reasoning on the whole tends to think in terms of a rule model, that is to say a model whose ontological (what exists) foundation is a legal rule which acts, in a logic framework, as a major premise with the facts forming the minor premise.

This crude syllogistic model can occasionally be found in judgments, but most logic and AI & law theorists have long moved on from such thinking. Legal argumentation is much more complicated. For example, Robert Mullins notes:

> The greatest difficulty for general rule accounts – in either their strict or defeasible form – lies in the piecemeal contribution that precedent cases seem to make to the formulation of more general rules. Especially when a body of precedent is well-settled, it is common for legal scholars and practitioners to offer more abstract, rule-based summaries of legal doctrine. But these doctrinal "rules" are often extracted from a body of cases rather than a single case. The *rationes* of individual cases are typically much less general than the doctrinal rules that are used to summarize entire bodies of case law (in Duarte d'Almeida & Ors 2025: 71).

However, what if "general rule" is replaced by "principle"? What if precedent (rather than formal logic)—as Lord Goff once seemed to suggest (1983)—was the authoritative foundation for the induction of principles?

The idea that legal knowledge is founded on principles (*principia*) has a long history stretching back to the Roman law sources in which the last title in the *Digest* is devoted entirely to over two hundred *regulae iuris*

(D.50.17). The medieval jurist Baldus (1327-1400) famously asserted that he who wishes to know something must first know its principles (see Samuel 2025: 6-7). Over the next few centuries these *principia* became *axiomata* and this propelled legal reasoning towards the idea that it was an inferential process founded on deduction. Such thinking penetrated the common law world to some extent. As Goff observed, when he was a student "there appeared to exist some judges who saw the law almost as a deductive science, a matter of finding the relevant authorities and applying them to the facts of the particular case" (1983: 326). He went on to say that this was no longer the case and that it is now a "search for principle [which] is a task which judge and jurist share together" (1983: 329). Mullins examines this principle-based thesis of precedent but concludes that "the authority of precedent becomes a matter of degree" and is thus "hard to reconcile with the usual treatment of binding precedent" (in Duarte d'Almeida & Ors 2025: 72). Moreover, there is "the implausibility of extracting the weight of different principles from judicial practice" (at 80). From a process point of view, unless principles can be elevated to axioms (unlikely), it would appear, therefore, that "considerable work remains to be done" (at 80).

Barbara Levenbook mentions another problem regarding inference and precedent. "There is often", she says, "no explicit normative statement in a judicial opinion, no statement whose semantic meaning yields a norm to be followed that could be considered *ex ante* law laid down or applied by the precedent." She then adds that "even when rules are stated in judicial opinions, they are not always considered to be part of the opinion that binds in (or sets) law, even when they are on a point of law that was brought and argued before the court" (in Duarte d'Almeida & Ors 2025: 55). Basically, she concludes, there are no "leading theories [that] are good at being comprehensive prescriptions for uncovering *ex ante* law; they are badly defective or problematic at this task" (at 62).

This view is seemingly contradicted by Melvin Eisenberg who claims that "the common law is almost entirely rule-based, that is, based on the application of legal rules to the facts of the case to be decided". He then adds that jurists who have claimed that reasoning in the common law is analogous rather than rule-based "are incorrect", for the "common law courts seldom reason by analogy" (2022: 7). And those who "claim that legal reasoning depends on a finding of similarity between a precedent case and the case to be decided … are also incorrect" (2022: 8-9). If Eisenberg is right, it would surely seem that the rule is the sole focal point of ontological attention in legal argumentation. Levenbook does not discuss Eisenberg's view, but interestingly she cites in a footnote

(in Duarte d'Almeida & Ors 2025: 55) Arthur Goodhart's article on determining the *ratio decidendi* of a case (Goodhart 1930). She does not discuss the substance of this article which perhaps is to be regretted because not only is his thesis an interesting one (regarding logic, analogy and material facts) but also was seemingly adopted by Lord Simon in a 1972 House of Lords case (*Lupton v FA & AB Ltd*). This judge was of the opinion that legal reasoning and the application of the *ratio* of a precedent was a matter of a complex syllogism in which the rule extracted from a precedent was the major premise while the "material facts" were the minor premise. The importance of this notion of "material facts" is that if a precedent is to apply in a new case the material facts of this case must be analogous to the material facts of the precedent.

If this model is correct, legal reasoning and legal argumentation are as much dependent upon what constitutes both the "material facts" and the analogy as upon the determination and application of any rule forming the *ratio decidendi* of the precedent. Eisenberg, as has just been seen, asserts that common lawyers seldom reason by analogy, and two other American jurists claim that such reasoning is, anyway, illegitimate (Alexander & Sherwin 2008: 234). Moreover Eisenberg, who actually discusses Goodhart's thesis, asserts that "the courts seldom if ever single out some facts as material and there is no metric for objectively determining which facts a court deemed material". And "even if it could be determined what facts the precedent court deemed material every such fact could be stated at various levels of generality and each level would yield a different result" (2022: 25). Eisenberg has a point of course, as facts can be viewed at countless different levels of observation (Waddams 2003: 14). Yet, a United Kingdom (UK) Supreme Court judge has asserted recently that:

> The distinctive mode of common law reasoning is analogical reasoning. The parties to a dispute come to court and argue that their case is analogous to other previously decided cases. The courts explain and justify their decisions by reference to analogies with one or other set of previous decisions.

And Lord Sales continued:

> Through analogical reasoning, the common law can bring into account plural disparate and incommensurable values and hold them in a reasonably stable balance for a particular local area of the law (Sales 2025: 8).

In forming his views on analogy, Lord Sales appears to have been influenced by Cass Sunstein, for, immediately after his observations outlined above, he quotes quite extensively from this author (Sunstein 1993).

Does this relevance of analogy undermine the whole idea of legal reasoning being an inferential process capable of forming the foundation for an AI & law model? Or can analogical reasoning itself be modelled into an inferential process? Luís Duarte d'Almeida and Silvia Zorzetto examine the possibility of constructing such an inferential model, but ultimately conclude that the question of "how to model arguments by analogy remains an open one" and that they "have not presumed to close it in [their] chapter" (in Duarte d'Almeida & Ors 2025: 196). Should one be surprised by this conclusion? Much depends on how one views analogy. Rouvière regards analogy as a means of extending a legal text to cover a case not explicitly foreseen by the text; it reveals something inherent in the written rule or legal precedent and is thus designed to suppress the difference between a case or text acting as a reference and the unforeseen case before the court. In theory, then, it is not a means of introducing something new (2023: 215). This author refers to the Roman text which states: *Et ideo de his, quae primo constituuntur, aut interpretatione aut constitutione optimi principis certius statuendum est* (and this is the reason why, regarding provisions laid down for the first time, it is necessary to determine more precisely the sense either by interpretation or by a legislative enactment by his excellency the emperor) (D.1.3.11). And he does this to indicate that all texts do not reveal their sense in the bare words themselves; there needs to be a means by which their explicit sense can be revealed. Analogy thus becomes a hermeneutical tool; the bare words of the text are a sign beyond which, revealed by analogy, is what the text actually signifies.

[F] HERMENEUTICS AND PROCESS

What, then, is the relationship between logic and hermeneutics? The French law professor Hugues Rabault thinks that the two methods can be harmonized. His starting point is the argument a contrario which, as he indicates, is the reverse of reasoning *a pari* and *a simili*; that is to say it is the reverse of analogy and is founded on logic (2024: 117). A rule that states "no smoking inside the building" logically implies that smoking is permitted outside the building. Now the reverse of the principle of contradiction (*a contrario*) is the principle of non-contradiction which is where analogy has its role. Is the escape of electricity analogous to the escape of water for the purposes of the rule in *Rylands v Fletcher*? One could start by asking if electricity finds itself in contradiction to water and, if not, then it logically follows that the rule in *Rylands* will apply to the escape of electricity. Rabault also makes the point that the argument *a fortiori* is a form of analogy (2024: 109). If I negligently destroy your

television, I will be liable in tort (tort of negligence), but if I deliberately destroy your TV it must "logically" follow that I will be liable in tort on the basis of the argument *a fortiori*. Here, however, as Rabault admits, this kind of liability would be based on moral values and so brings into play the discipline of axiology (2024: 117). It is a matter of quasi-logic, where interpretation (hermeneutics) has its role. Logic still has its own role in that identical situations must logically be treated identically, which is a legal form of the principle of the logic of non-contradiction. Judges, in other words, when they use analogy, are attempting to establish a coherent (logical) system of how cases are treated (2024: 120). Hermeneutics gets embraced by processual thinking (at least in part).

Susan Provenzano and Kathryn Stanchi seem to echo, at least to some extent, Rabault's merging of logic and analogy. "Analogy", they say, "is one way in which subjectivity and ambiguity are injected into legal syllogistic argumentation because, of course, analogies are never perfect and multiple different analogies can fit a given legal question" (in Duarte d'Almeida & Ors 2025: 519-520). However, they go on to say, a "solid, persuasive analogy will move beyond surface comparisons and be comparable on a deeper, relational level" (at 520). They give an interesting example to illustrate the difference between a surface and a deeper analogy. A group of people are shown two photographs: one depicts a car towing a motorboat while the other depicts a tow truck towing a car. The group is asked to indicate the most analogous vehicle. An observer using just a surface comparison will choose the car, whereas a person given a chance to reflect, will go for a deeper analogy, namely choosing the car from the first photograph and the tow truck from the second. This distinction between the surface and deeper analogies is vital, the authors say, because surface analogies can result in unjust decisions (from a social justice viewpoint) that are the result of rhetorical visions of the facts of a case rather than from what the law itself might indicate if a deeper reflection was undertaken. One might add that one particularly helpful feature in this contribution—a feature that is often absent in many of the other chapters—is that the authors illustrate this problem in looking in detail at some American cases. They analyse some actual judicial reasoning. Their message—or one message at least—is that the use of analogies, along with a deep reflection on the facts of a litigation dispute, is a fundamental hermeneutical necessity if the syllogistic logic, which they say is the typical form of legal reasoning, is not to be the victim of rhetorical manipulation.

So how one might summarize the relationship between processual and hermeneutic reasoning? Can, indeed, the two really be harmonized or is one faced with two quite different methodologies? Euan MacDonald,

looking at what is special about legal argumentation, employs the traditional distinction between easy and hard cases. In easy cases, processual reasoning (subsumption and deduction from rules) "yield determinate answers for a broad range of questions". In hard cases it is different. "Most will also agree", he says, "that in 'hard' cases, judges will often—and are legally permitted and empowered to do so—supplement the reasons derived from positive law with considerations drawn from moral principles" (in Duarte d'Almeida & Ors 2025: 398). Basing himself on the work of Robert Alexy, MacDonald thus concludes that what is special about legal argumentation is this:

> [It] *combines* a range of features in unique ways: reliance on authoritative rules and precedent, coherence-driven rational reconstruction of doctrine, interpretations of authoritative announcements by means of recognised "canons", reliance on particular argument forms (such as the argument by analogy, the argument *a fortiori*, the argument *a contrario*), and the frequent need for weighing and balancing reasons generated not by rules but by principles. All of these combine with differences in argumentation in different institutional settings; and interact in complex ways with general practical argumentation (at 399, emphasis in original).

[G] VIRTUE, EMOTION AND INTERDISCIPLINARITY

As a general description of legal reasoning and argumentation, MacDonald's statement seems uncontroversial enough. Although it is not really original—Professor Bergel has consistently shown in his work on general theory of law and on legal methodology (Bergel 2012; 2018) how legal reasoning and argumentation is a combination of different kinds of arguments, models and schemes of intelligibility (hermeneutics, dialectics, functionalism and structuralism)—it does bring one back to Atias' comment (1994). That is that there is what might be termed an epistemological and methodological gap between the legal rule or precedent and the solution in a concrete case. The gap represents a limit to the notion that legal reasoning is an inferential process. As Amalia Amaya puts it, legal systems "have gaps which the decision-maker needs to fill in through a diversity of tools, such as legal analogy, extensive interpretation, and principle-based reasoning". In addition, judges "may also need to rely on extra-legal considerations in order to fill in some of the legal gaps" (in Duarte d'Almeida & Ors 2025: 486).

Even Eisenberg, a committed rule-theorist as has been mentioned, recognizes this gap. In addition to rules and deduction (broadly speaking) being the basis for legal decisions, he adds that "good judgment" is an

important legal quality as well. However, he says, this is something that "cannot be taught and is hard to acquire" (2022: 89). If good judgment is a matter of virtue and emotions—of course it may be more than this—then the Duarte d'Almeida book adopts a different attitude; these are things that can be taught, or at least discussed openly in the law school. Thus, Amaya discusses the role of virtue in legal reasoning and what she means by this word "is a disposition to feel, behave, and, critically, reason in a certain way". It is "the possession and exercise of a virtuous character [that] enhances one's capacity to reason—just as character flaws detract from the quality of one's reasoning" (at 483). It should be evident at once that one is now in a very different methodological and epistemological world than the one inhabited by true processual theorists searching to create the perfect machine judge (who, of course, would be neither virtuous nor unvirtuous, and not affected by emotions).

Amaya argues that "the possession and exercise of virtue enhances legal reasoning in a number of important ways". She discusses each of these ways in some detail and concludes that the "virtuous person's legal reasoning is focused on the particular, engages perceptual and emotional capacities, and involves a fine description of the situation of choice and a specification of the values at stake in the light of an (always perfectible) conception of law and its role in advancing human flourishing" (at 485). Can such reasoning be taught? She thinks it can. "Teaching legal reasoning", she says, "becomes, as a result, a much more substantive, less technical subject than what is conveyed by standard courses of legal reasoning, with their focus on forms of legal argument" (at 495). She does not claim that this would be simple—"the development of a virtuous character is a lifetime endeavour"—but her list of teaching suggestions (a "taxonomy of judicial virtues") is intriguing, ranging from biographies, through to psychological and moral inputs, to pedagogical materials which "could include film and literature" (at 496). She recognizes the kind of objection that an Eisenberg might make, namely that such intellectual virtues cannot be taught; but she says the challenge can be met, although she concludes that it will require much future research embracing many different areas of culture, reasoning and intellectual thought.

It is hard to disagree with Amaya's "taxonomy of judicial virtues" as part of the legal reasoning syllabus. Yet, there is something so abstract about this list that it is not easy to see how it connects with actual legal reasoning. Studying film and literature is no doubt a good thing, but what does this study involve? Watching films and reading books, followed by class discussion? Studying academic writing on literature and film and comparing such literature with academic law writing? She does not explain

in any depth. What the chapter lacks are any concrete examples taken from the law reports displaying what she considers to be "virtuous" legal reasoning and argumentation. Did the late Lord Denning display virtue in his, or some of his, judgments? What about the late Lord Bingham or Lord Diplock? What about those Court of Appeal judges who have upheld what some might consider to be illiberal legislation? Sadly, there may be some who would regard Amaya's thesis, with some justification perhaps, as somewhat removed from reality given not just this lack of concrete examples but also the sheer fuzziness of notions such as "virtue".

Maksymilian Del Mar, one of the most interesting legal theorists working in the UK today, adds emotion to Amaya's virtue. He, however, puts the emphasis not on virtue but on value. He explains:

> Emotions can be thought of as bridges or links between cognition and value; they enable us to know value. Within the practice of legal reasoning, one of the key objects of knowledge is value. Thus, one of the key roles for emotion within the practice of legal reasoning is enabling those engaged in that practice to know value (in Duarte d'Almeida & Ors 2025: 499).

What, exactly, does Del Mar mean by value in this context? He suggests that there two aspects. First, there is "epistemic emotion" whereby, for example, "treating something as an object, we are already indicating it, rather than some other object, as important to attend to". Secondly, value can mean "the sense that something is worthy of our protection or further pursuit – that something really matters, and may be at risk". This sense is much easier to comprehend at first sight since "we may treat freedom, or dignity, or equality, as valuable in this sense". Indeed, we "may include less sonorous, more ephemeral senses of something being valuable, such as a person's preference or interest" (at 499). One is immediately reminded here of a piece of legal reasoning by the Roman jurist Ulpian (not actually mentioned by Del Mar). Discussing the obligations of a usufructuary. This jurist does not view land just in terms of its economic value; there is the human pleasure of shady walks under non-profit making trees (*deambulationes arboribus infructuosis opacas atque amoenas habens*) and thus the usufructuary is not entitled to cut down these trees in order to make a vegetable garden or anything else designed to make a profit (D.7.1.13.4). There is value beyond monetary value.

Del Mar goes on to set out a couple of situations where emotion has a role in legal reasoning. These are processing hypothetical scenarios and signalling attitude through style and tone. What is particularly striking about these scenarios is that he examines in detail some actual common law judgments from UK cases, something that the other chapters in the

Duarte d'Almeida book rarely do. He examines, for example, the cases of *White & Carter v McGregor* (1962), *Sim v Stretch* (1936) and *Ingram v Little* (1961) and concludes that common law judgments "are not cold, lifeless, emotionless texts, with nothing more than abstract normative statements extractable from them to be plugged into logical calculus" (at 504). And so to:

> engage in common law reasoning is not always, or not even mainly, to offer a good syllogism without logical mistakes: it is to be good at engaging in reasoning together, and this may sometimes include bending or suspending certain norms of logic or other epistemic norms, which apply to individual modes of reasoning, in order to enable or improve the practices of reasoning together (Del Mar in Duarte d'Almeida & Ors 2025: 507).

Professor Del Mar's approach is, as mentioned, striking because few of the other chapters in the Duarte d'Almeida book look at actual cases and actual judgments. On the whole—but there are exceptions—the authors focus primarily on theorists and so the reader ends up knowing what legal argumentation *ought* to be, at least according to the theorist in question, rather what it *is*. In fact, Del Mar seems partly—or perhaps obliquely—to acknowledge this when he says, "the writing of the theory of common law reasoning is itself an emotional exercise" in that, for example, "theorists often express anxiety about activist judges or courts (whether progressive or conservative), and convey concern for the moral quality of the law and the political authority of the courts in the face of certain judicial methods". (Where is the "virtue" the cynic might ask?) In short, such theorists "adopt certain personas as authors" and "these personas … are full of emotion" (at 512). One thinks here of Dan Priel's comment about legal formalist theorists who, it seems, regard those jurists who pursue interdisciplinary approaches as an "enemy" (Priel 2019: 167). Such a reaction by supposed theorists appears somewhat "emotional" (and may also lack "virtue") to say the least.

[H] WHAT HAS LEGAL REASONING AND ARGUMENTATION BEEN?

These theories—virtue and emotion—might seem novel and many might be sceptical, but comparative lawyers, even if they have not thought in terms of virtue or emotion, have certainly mirrored some, if not many, of Amaya's teaching suggestions (see further Samuel 2024; 2026; Muir Watt & Samuel 2026; Legrand 2023; 2025; 2026). No doubt some might object in saying that methodology in comparative law is not the same as the methodology of legal reasoning and argumentation. Yet, care must be

taken here because once one begins to look beyond the discipline of law to theory and method in other disciplines—which many comparatists are now doing—a much more complex epistemological picture emerges, which does not see law as somehow methodologically functioning independently of, or outside of, this picture. Many lawyers like to think that their doctrinal or "dogmatic" (as the civilians call it) method is somehow special to law. And, in one respect, it is.

This one respect is history. If one poses the question—which the Duarte d'Almeida book does not (nor in fact does Rouvière)—about what legal argumentation has been the response, arguably, provides some fundamental information. Let us start with the observation of the late Robert Blanché (1898-1975), an epistemologist, that all the sciences can be seen to have passed through four historical stages: these are a descriptive, an inductive, a deductive and an axiomatic stage (1983: 65). While one might dispute law as being a "science" (although many have thought it was, and some still believe it to be true), its historical development does seem to fit the Blanché pattern. One might describe the early Roman law thinking as being descriptive before moving into an inductive stage characterized not just by the classical period of Roman but also by the Italian medieval epoch. With the humanist systematizers, legal method "progressed" into a deductive stage and then, with the natural lawyers and, later, the Pandectists into an axiomatic one. What, then, is the position today? One could talk of a fifth, post-axiomatic, stage in which the methodologies of the past three, if not four, stages find themselves competing at a synchronic level.

Enough has been said so far about the Duarte d'Almeida book to indicate how these competing methodologies are playing out: for example, axiomatics (mathematical logic) (for example chapter 18) is countered by emotionalism (chapter 31), hermeneutics (chapters 3 and 4) by analogy (chapter 12), functionalism (chapter 16) by dialectics (chapter 23), rhetoric (chapter 32) by virtue (chapter 30) and coherence (chapter 13) by feminism (chapter 29). This looks, admittedly, like a very rich epistemological tapestry, but not only do many of these chapters lack concrete examples from the law reports, as has been mentioned (although there are exceptions); these chapters equally lack any serious historical research into legal method. This means that a researcher reading this collection will get the strong impression that the authoritative sources of contemporary legal argumentation and reasoning are to be found only in the present and the last century. Such sources are not to be ignored of course. Yet, the frequent references to theorists such as Hart, Kelsen, Raz, Alexy, Leiter, Schauer, Alchourrón and Alexander will provide only a

limited epistemological insight in the methods of lawyers. It would probably be wiser for a research student to spend time examining the material in *Studies in the Glossators of Roman Law* (Kantorowicz & Buckland 1938) and in the cases in the English law reports from 1800 to 2000, not to mention of course the *Digest of Justinian*. These texts will provide much raw material, so to speak, about legal argumentation and reasoning. Even the AI & law researcher might find some useful material in the writings of the medieval Roman and canon lawyers whose methodology was founded partly on algorithmic thinking (various Glossators wrote works on *distinctiones*; and Bartolus was notorious in his use of *aut* … *aut* in the analysis of legal texts and problems).

In fairness, there are some aspects of legal method that will not be found, as such, in these actual legal texts (although there will be useful data). One thinks, in particular, of feminist approaches, and perhaps of sophisticated functional analysis (although the law and economics approach has older roots than one might think: see Jones 1940: 235-269). The sources underpinning law and psychological approaches—the study of the mental processes involved with legal reasoning and argumentation—equally do not stretch back much beyond the last century (Jones 1940: 187-202). So, of course, a diachronic approach must embrace material up to contemporary times. However, while much of this work at a theory level might be less dependent upon a deep historical investigation, some theories do need a more in-depth research base because there are what might be called model frameworks that have been long in construction. This is particularly true of methodological approaches such as dialectics, hermeneutics and structuralism, this latter methodology being at the heart of logical inference (processual) theories.

Dialectics is a good example. It has roots going right back to Roman law where dialectical distinctions abound. One thinks of the dichotomies between public/private law, *res corporales*/*res incorporales*, actions *in rem*/actions *in personam*, consumable/non-consumable property, free persons/slaves and so on. It encouraged the analysis of a topic into distinct divisions and oppositions (see, for example, D.48.19.16) and generally influenced classification thinking (for example, contract/quasi-contract versus delict/quasi-delict). This kind of thinking equally operated at the lower level of abstraction of legal reasoning itself, as several texts bear witness (see, in particular, D.9.2.52.2, D.41.1.55). This dialectical method was developed further by the medieval jurists (as has been mentioned). What is interesting about this period is that the epistemological mentality was founded almost exclusively on the idea of authoritative texts, one of which was of course the *Corpus Iuris Civilis* which was seen as coming

indirectly from God via God's agent on earth, namely Justinian. This text provided not just a mass of legal notions but also, seemingly, a methodology; in other words the Roman law materials appeared to be revealing the method to be employed, thus encouraging the Glossators and Post-Glossators to develop it to its full capacity.

Yet, what is interesting about the Roman and medieval periods is that one has to search the actual legal texts—texts in which the "law" and commentaries on the "law" were rather indistinct—in order to be able to reflect upon the methods of these jurists. There were no books on legal method or legal "theory" as such. The Romans had, of course, written books for law students, but the *institutiones*, if Gaius and Justinian are the classic examples, did not inform students about how to reason and argue. There were no "theories" of legal argumentation and reasoning. In saying this, one is talking exclusively about the subject field of law. Outside of law, philosophers such as Aristotle had much to say about rhetoric, reasoning and argumentation and no doubt the Roman jurists were influenced by the Greek philosophers, as indeed were the medieval jurists when translations of the works of Aristotle began circulating in Europe during the twelfth century. But the point to make is that the methods of the jurists were enclosed, so to speak, withing the details of the law itself.

This was to change with the end of the medieval world. Henry Maine, describing the seventeenth century as "a great juridical era", famously went on to say that the jurists of the period "speculated rather on the possibility of rearranging [the law] in new and more philosophical order" and so legal improvement "was rather a reform of law-books than a reform of law" (1890: 362-363). Walter Jones subsequently noted that "[n]o lawbook [during this period] was complete which did not bear the word *methodus* or *methodice* on its title page" (Jones 1940: 39). The sixteenth and seventeenth centuries began to witness, then, a separation between texts stating the law and texts expounding legal argumentation and method. Such a separation should not be underestimated in that it provided the opportunity for the authors of legal method works to indulge not just in descriptive statements but also in normative assertions as to what legal argumentation and reasoning "ought" to be.

This brings one back to Leibniz who, as mentioned, thought that law could be dispensed by a machine since it was knowledge capable of being compared with mathematics ("*mathematicus demonstrationes*": Leibniz 1669). It could be reduced to a set of axioms and theorems. What is being asserted here, of course, is that legal argumentation and

reasoning is processual. Interestingly, two earlier jurists who had written texts on the teaching of legal method seemed reluctant to reduce such argumentation and reasoning only to syllogistic logic. Matteo Gribaldi (1505-1564) certainly asserted that the syllogism was the most perfect form of reasoning, but he also noted that:

> since nature continually comes up with new forms, and continually among mortals new facts arise, it is not easy or practical to define everything at a universal level, rather to proceed by individual cases deciding them with reference to generic categories and their circumstances (such as would please Neratius) (1541: chapter XI).

He thus set out his celebrated method of analysis: *Praemitto, scindo, sumo, casumque figuro, perlego, do causas, connoto, et obijcio* (I introduce, I divide up, I summarize, I set out the case, I read through carefully, I give the causes (reasons), I annotate, I raise objections). Gribaldi's contemporary, François Douaren (Duarenus) (1509-1559), equally thought that operating at a universal level was inadequate: "practical analysis (*usus*) must be employed without which the benefit of the discipline is lost: just as, *vice versa*, practice (*usus*) without method (*methodus*) and a procedural path (*via*) has minimum value". And he famously concludes with the pithy phrase *in universalibus methodo, in singulariis exercitatione* [for general principles method, for specific cases practice] (1547: 24). (In fact the Post-Glossator Philippus Decius (1454-1535) had already asserted c*ognitionem specierum debet praecedere cognitio generis* [knowledge of species ought to precede knowledge of genera] in his lectures on the *Digest* title *de regulis iuris*, *regula* 1.)

These early teaching books on legal method are thus interesting in that in extracting reasoning and method from the texts of the (largely Roman) law itself they were creating a model which was not just supposedly descriptive (how the Roman jurists actually reasoned) but also "theoretical" in that the model incorporated the humanist rearrangement of Roman law into a much more coherent system. This had the effect of asserting the importance of legal knowledge as a set of coherent principles and axioms in turn emphasizing syllogistic logic as if it was a method that was inherent in Roman law reasoning itself. In fact the Roman jurists themselves seemingly had a distrust both of rules as the basis of legal knowledge (D.50.17.1) and of definitions (D.50.17.202). Yet, once the systems model had established itself, Roman legal knowledge, together with legal method, was now on a path that was not actually Roman. However, it remained normatively valid by reason of its epistemological foundation being vested in human rationality, this validity in turn being reflected back onto the Roman texts themselves. As has been mentioned,

Leibniz considered the Roman jurists to be almost like mathematicians. The point to make, however, is that it was, in effect, now possible to propound "theories" of legal reasoning and argumentation relatively free from the legal texts themselves. Gribaldi and Douaren may well have been reluctant to commit themselves purely to processual theory (syllogistic logic), but later jurists were not. Johann Heineccius (1681-1741) thought that students need learn only the axioms and theorems of law; they should not have their brains stuffed with the facts of cases (1725: "Preface"). And this mathematical thinking went on to furnish the epistemological foundation for codification where, methodologically, the syllogism became "l*a figure par excellence de l'acte de juger*" [the key notion in the act of judging] (Champeil-Desplats 2026: 90). In Germany this "mathematical" thinking was taken to an even higher level of conceptual abstraction by the nineteenth-century jurists who designed an approach to law in terms of a "*dogmatique* conceived as a science", that is to say a jurisprudence of legal concepts (*Begriffjurisprudenz*) capable of solving any legal problem uniquely by means of a "mathematical rigor and logic". As professor Champeil-Desplats explains, the "work of a jurist is associated with that of a physicist or chemist" whereby the "jurist is called upon to analyse, simplify, decompose and recompose, by means of specific legal concepts, the law as it is seen in its raw state" (2026: 95).

[I] COMMON LAW AND DOCTRINALISM

It is tempting to think that this kind of thinking had little effect on the common law. The absence of university law faculties teaching the common law before the nineteenth century meant that humanism did not have an institutional means through which it could start to dominate common law thinking (although it was not without some influence) and the very different procedural tradition—in particular juries and writs—helped resist, in general, the influence of Roman law. And, of course, the common law resisted codification.

Yet, the position became more complicated in the nineteenth century. The 1846 Parliamentary Select Committee Report into the state of legal education in England—which concluded that there was no legal education worthy of the name in England and Wales—advocated the teaching of legal "science" in universities and the Inns of Court, such "science" necessarily being based on civilian ideas (Stein 1980: 78-79, 123). In the United States (US), Joseph Drake, in an editorial preface to a translation of a work by Rudolf von Jhering, and written in the early twentieth century, wrote that:

> our American jurists, our legislators and our courts, both bench and bar, are still holding fast to an historical "Naturrecht" built up on the precedents of the Common Law, which has many analogies to the type of juristic thinking in vogue in Germany during the first half of the nineteenth century (Drake 1913: xxiii).

Drake, in challenging this civilian juristic thinking, was, of course, a precursor to a movement, American Realism, that was seriously to challenge, if not destroy, the processual "Naturrecht" thinking in American (and later English) law; it was, as one Realist put it, nothing but "transcendental nonsense" (Cohen 1935). This Realism shifted the emphasis from a structural (conceptual systems) view of law to one founded upon a functionalist scheme of engagement (see, for example, Cohen 1935). Indeed, it went further, and so for jurists such as Jerome Frank (1889-1957) social and psychological factors regarding judges were as important as any manipulation of legal rules and concepts. However, such a psychological "theory" of legal reasoning and argumentation does not impress Manuel Atienza. Noting that there is now a new type of "cognitivist revolution", he asserts that what is needed is not a theory that *explains* a legal decision, which is "in effect, an ideology", but one that can "both evaluate and guide the conduct of judges". In other words, "we need a *normative* theory of legal reasoning" (in Duarte d'Almeida & Ors 2025: 460-461, emphasis in original). Why such a normative theory should be less ideological is unclear. Nevertheless, Frank's vision equally did not impress common law jurists such as the late Peter Birks (1941-2004) who complained that it is in the US where "Jerome Frank and his intellectual successors did their most serious damage, [and] it has never recovered and now lets in floods of law and economics" (1996: 4).

Yet, has the common law "never recovered"? Markus Dubber argues that "the story of German legal science may not differ as radically from that of US legal scholarship as is generally supposed" (2018: 109), while noting, also, "the phenomenon of New Doctrinalism" that is making an appearance in US academic circles (2018: 102). In the UK there has also been a re-assertion of doctrinalism (see, for example, Bódig 2021); and whatever one may think of the intellectual strengths of these re-assertion arguments by those in the common law world the overriding point that remains indisputable is that legal reasoning and argumentation, as practised in the courts, remains firmly embedded within a doctrinal and generally positivistic model of law. This said, as Torben Spaak points out, legal theory "is not something most judges or legal scholars engage in, or even consider interesting"—theory is for "legal philosophers" (in Duarte d'Almeida & Ors 2025: 407). But just because judges and doctrinal scholars lack such interest or concern it does not mean that

their methodology is not embedded in some unconscious, or semi-conscious, model or "theory" of law. One only has to read the law reports and doctrinal law journals to appreciate that there is still force in the medieval legal "theory" that *omnia in corpore iuris inveniuntur* [everything is to be found in the texts of Roman law] (Accursius gloss on D.1.1.10) which in turn meant that it was *non licet allegare nisi Iustiniani leges* [it is not permitted to propose any argument unless it is from Justinian's book of laws] (Azo, *Quaestiones*, *quaestio* 10, *Scholans quidam*). Of course, it is not the Roman texts that govern modern common law thinking, but as this definition of contemporary doctrinal scholarship reveals the epistemological vision seems unchanged:

> [D]octrinal research characteristically adopts an internal perspective on the law, viewing it as a self-contained system of rules and principles established by legal sources. Where inconsistencies and gaps are identified, these are filled by refining accounts of the rules and principles in a manner that best fits with the "inner logic" of the legal system. Thus, doctrinal accounts evaluate the attractiveness of articulated rules and principles exclusively on the basis of legal sources. Such accounts are "normatively inert" in the sense that the answers they furnish are not impacted by the desirability (moral or otherwise) of the rules and principles posited by legal sources (Theil 2025: 1048-1049, footnotes omitted).

And those who dare introduce arguments based on material outside of the statute and law report books may find themselves admonished by the judges (see eg Lord Goff in *Hunter v Canary Wharf*: 694). Who needs some old jurist like Azo when we have Theil?

[J] BACK TO LEIBNIZ?

Given this closed epistemological vision of law as a body of knowledge, which, as has been mentioned, seems to be making an academic comeback, one might ask why it is making such a comeback. Perhaps one reason might be a reaction to interdisciplinarity which many lawyers and jurists, no doubt following Professor Birks, view as an "enemy" (Priel 2019). As a French specialist in legal epistemology once suggested: the adoption by jurists—by deliberate choice—of the "positivist paradigm" meant that they could dispense with having to bother with any diachronic or interdisciplinary aspects regarding legal knowledge. Legal method, as a result, adopted exclusively as its object just texts. "The jurist", said Christian Atias, "is a reader of statutes and legal decisions" and their "principal task is, then, to interpret them and to determine the consequences in the cases that are submitted to them or ones that they imagine" (1985: 91). This work does require a certain method, "but a

certain importance only regarding logic" (1985: 67). Beyond this, there is not much else doctrinal lawyers need do (and much of what they do has often been done before). And this is one reason why a question can be raised as to its academic value.

There is, however, another reason for a renewed interest in doctrinal thinking. As Manuel Atienza says: "Of far greater interest, in my view, is the connection between the theory of legal argumentation and the field of studies often referred to as 'Artificial Intelligence and Law'." For it is "clear that the questions and problems it addresses are by and large the same as those that have arisen in the theory of legal argumentation over the same period". Atienza notes—as does Giovanni Sartor in his chapter on legal argumentation and AI (in Duarte d'Almeida & Ors 2025: 347-368)—that research into AI and law has moved on from deductive processual models based upon a rule thesis. It now:

> focuses on facts and evidential reasoning, assigning relevance not just to reasoning as such but also to story schemes and narrative coherence, and addressing the problems of simply transplanting mathematical concepts of probability into law (in Duarte d'Almeida & Ors 2025: 461).

The move is away from deductive models.

There are obstacles—something of an understatement one is tempted to say—as both authors admit. There is, says Sartor, a "difficulty of formalising legal knowledge" (at 367), while Atienza says there are "blind spots". One problem for him is that "the connections between the two fields of study – the theory of legal argumentation on the one hand, and AI as applied to law – are unfortunately still underexplored" (at 461). The issue, surely, is that both these authors seem little interested in actually examining legal reasoning and argumentation as it is found in the courts (legal debates between counsel and judges in the common law systems) and in the actual judgments of judges. Sartor and Atienza cite few if any cases and focus entirely on the academic research literature. As Atienza admits, "dialectics", as found in the courts, requires "skills that cannot be understood in terms of argument schemes without simplifying them to the point of distortion" (at 459). The established theories, says Atienza, are founded on "a method of rational reconstruction: on the basis of how judges actually argue, they sought to also establish criteria regarding how they should do so" (at 451).

One trouble with the whole Duarte d'Almeida and colleagues book is that there is, with some exceptions (see, for example, Del Mar and Provenzano & Stanchi), very little devoted to how judges actually argue

and reason (for some examples of such reasoning see Samuel 2016). A quick look at the index reveals the names of not many cases. The question as to why judges differ in their decisions is not really examined which in turn seems to have resulted in a disinterest in examining differing models and differing schemes of intelligibility (on which see Muir Watt & Samuel 2026; Samuel 2025) which surely have a fundamental role in legal reasoning and argumentation? If judges can differ because they are operating within different models and (or) engaging with a text and with facts employing different *grilles de lecture* what implications does this have not just for "theory" (probably an overused term by jurists) but also for AI & law? If AI is to replace judges, does this not mean that a single machine based upon the idea of a "legal singularity" would be inadequate? Would not a "Supreme Court" based purely on AI require at least five or more robot judges each programmed on different models and schemes of intelligibility?

[K] CONCLUDING OBSERVATIONS

Accordingly, researchers seeking enlightenment regarding legal argumentation, while they will certainly find things of interest in the Duarte d'Almeida and colleagues book, will not emerge from reading the chapters with much insight into how judges actually argue and reason. There is much theory but little actual data. Professor Rouvière's book would probably be a better bet since his research is rooted both in cases (*jurisprudence*) and in doctrine. Of course, it is a very different kind of publication than an edited work and, for the common lawyer, it is orientated evidently towards French law. But it is comprehensive and the author recognizes that there are legal reasoners beyond the French borders. This said, it is regrettable that neither book seems interested in a diachronic approach. This is regrettable because, as Rouvière says, his analysis is one of methodology and not one of philosophy or epistemology (2023: 5) and so it would surely be useful for researchers into method to see how reasoning and argumentation have changed through the centuries. The history of Roman law in Europe is arguably a history of changing methods and these changes are reflected in the dichotomies to be found in legal thought today (see, further, Samuel 2022).

It would, of course, be inaccurate to assert that the epistemological situation has changed little since the humanists. Knowledge about logic is very much more sophisticated than it ever was in the time of Heineccius. Yet, the dichotomy between process and thinking—between logic and argumentation—is still embedded in contemporary works on legal reasoning, as both the Duarte d'Almeida and Rouvière books

indicate. Both books emphasize that legal argumentation is founded on a fundamental tension between logic (process, itself based on a structural systematization of law), on the one hand, and dialectical and hermeneutical thinking on the other. The tension itself is self-supporting: legal reasoning, says Rouvière, cannot be reduced to formal logic; equally, it cannot be reduced to uniquely to dialectical (topical) reasoning (2023: 10). Some see the situation as just complex. MacDonald, as has been seen, regards legal reasoning and argumentation as combining a range of features, while David Martínez-Zorrilla concludes that legal "argumentation is a complex activity involving several remarkably different (though related) processes, each of which gives rise to methodological questions" (in Duarte d'Almeida & Ors 2025: 435). These different processes can surely be explained, at least in part, by the history of legal method. Yet, the authors seem little interested in examining what legal argumentation and reasoning has been.

About the author

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News and Events

Compiled by Eliza Boudier

University of London

IALS News

IALS Library Legal Fiction Collection

Since 1947 the Institute of Advanced Legal Studies has been a repository of facts and an inspiration for authoritative legal research. In August our new legal fiction collection was launched. Visit us to celebrate nearly 2500 years of lawyers and the legal system being depicted, analysed and satirised, and to complain when your personal favourite has not been selected for inclusion by IALS library staff. Thrillers, mysteries, literary fiction, philosophy, social commentary, science fiction, even a romance or two–all tastes are catered for as long as you have some level of interest in the law and its associated structures and influences. All this and (for us) generous loan periods. The collection is housed in new book carousels near the Enquiry Desk on the 2nd floor of the library. All books in the collection can be found on IALS Library Search; they will have a classmark beginning SZ, which can be searched on Library Search to find a full list.

News from The Law and the Humanities Hub (LH*ub*)

Over the past year, LH*ub* has developed research infra-structures and scholarly networks in Law and the Humanities. The Four Nations Law and Humanities Forums brought together early career researchers across England, Scotland, Wales, and Northern Ireland, in collaboration with the University of Glasgow, Queen's University Belfast, Cardiff University, and the University of Warwick. Participants presented a mix of written papers and creative work, including dance, theatre and film-based pieces which spanned the intersections between law and history, philosophy, literature, poetry, art, architecture, performance, linguistics, cultural and media studies, and other humanistically informed disciplines.

LH*ub* networks have had quite a year. The Dance and Legal Materialities Network has advanced innovative work on embodiment, movement, and decolonial approaches to law through workshops and creative provocations; the Power, Justice and Imagination: Creative Writing

for Legal Research collaboration has explored the contribution of creative and literary methods to legal scholarship and will hold an event at the National Maritime Museum as part of the Being Human Festival; and the Law and Environmental Humanities Network has built conversations around law, ecology, and environmental justice, and is starting a year of reading groups and film screenings. We are looking forward to the launch of the new LH*ub*–IHR History and Law Seminar, which will strengthen connections between legal and historical scholarship, and the Half-Baked Series, an experimental forum of flash sessions designed to support emerging ideas in a collegial and interdisciplinary setting.

National Training Networks

During this past year the doctoral programme at IALS launched several national training networks to further support students in training in specific and popular areas of legal research. Over 50 legal academics and practitioners from across the United Kingdom and beyond have agreed to participate in planning and delivering educational events for students and early career researchers. These networks form part of the School of Advanced Study's national training remit funded by Research England.

The National Training Networks established thus far are: Financial Regulation; Access to Justice; International Law; Law and Technology; and Legislative Drafting and Policy. These networks join our already established Law and Humanities Hub (LHub) in providing national leadership for training researchers in law. Planning is underway for the first series of training events which will be available through the IALS events page.

Upcoming Events

Bloomsbury Walk and Building Tour

Date: 5 November 2026, 11:00am to 1:00pm

The walk will focus on the history of the Bedford Estate and on the multiple transformations of 17 Russell Square from an early 19th-century elite family home, then a hostel for colonial subjects, its near destruction by bombing in 1944 or 1945, and its reinvention as a prestigious modernist building designed by Denys Lasdun.

This event is free to attend, but advance registration is required.

See website for details.

Ecologies of Care Reading Group: The Rulers: Corporate Power in the Age of AI and the Cloud by Cecilia Rikap

Date: 23 November 2026

Venue: IALS Conference Room

See website for details.

Information Law and Policy Centre Annual Lecture and Keynote Panel

Date: 26 November 2026

Venue: IALS Council Chamber

Theme: Humans in the Loop: Human Agency in the Age of AI

Speaker: Professor Adams-Prassl, Professor of Law and Associate Dean (Research), Faculty of Law, Oxford University, Fellow of Magdalen College, and Senior Research Associate of the Institute for Ethics in AI.

See website for details.

Podcasts and Videos

Selected law lectures, seminars, workshops and conferences hosted by IALS in the School of Advanced Study are recorded and accessible for viewing and downloading.

See website for details.



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