

**ASTON UNIVERSITY**

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**ASTON STUDENT LAW REVIEW**

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**Collected works from Members of Aston Law School**

#### Fraud, Bribery, and Corruption

*Amarjit Tark* – ‘Revisiting the Fraud Triangle in the Curious Case of Bernie Madoff’ 6

*Bhavisha Parmar* – ‘Theorising Fraud within SeaWorld: Why are the Killer Whales Deprived of the Treatment they Deserve? 24

Trusts and Equity

*Mollie White* – ‘Automatic Resulting Trusts: The Unjust Enrichment Approach’ 38

[Jurisprudence](#_TOC_250001)

*Naa-Torshie Torto-Tetteh* – ‘The Abstract Examination of Law by Natural Lawyers and Positivists in Relation to General Sociological Issues and LGBTQ Rights 45

[Legal Systems](#_TOC_250000)

Parmveer Bains – ‘Legislation in the Digital Age’ 54

Jermaine Dixon and Amir Al-Monsur – Case Note – ‘Alder Hey Children’s NHS Foundation Trust v Evans [2018] EWHC 308 (Fam)’ 59

**Foreword**

The written analysis of complex factual and legal issues is a skill that is valued in all sectors: legal, business, government, and not for profit. It is a skill that develops from a keen mind that is nurtured through teaching, application, and example over many years; it is therefore a core aspect of our law degree programmes and one that I believe to be of foundational importance.

As the recently appointed Dean of Law, it gives me great pleasure to commend to you these examples of work from some of our LLB and LwM programme students which grapple with the application of legal principles and business theories to significant contemporary situations. Whether you are a fellow student or a supporter of the Law School, I hope you will join me in celebrating our students’ efforts. If you are a student, I want to inspire you to commit to the pursuit of excellent writing and other communication skills that will equip you to excel in whatever career path you choose following your time at Aston, in particular by joining the ranks of the Law Review contributors and perhaps serving on the Editorial Board. This is for later (but do contact Dr Daniel Cash in the Law School for information about future opportunities): for now, in this first week of term, please read and enjoy our

students’/your colleagues’ work.

Jonathan Fortnam

Dean of Law

In this fourth issue of the Aston Student Law Review, there are a number of pieces that aim to examine important issues ranging from the development of Fraud-related regulation from two very different fields, to an analysis of legislation in the digital age. In the near future, the ASLR will be publishing a Special Edition that focuses upon Women in the Law, as part of the School’s connection to the 100 Years of Women in the Law initiative. If you would like to be involved in this special edition, you have the choice of submitting either a 1,000 biography of an influential woman in the law, or you can submit an article analysing a key issue facing women in the law.

Everybody involved with the ASLR would like to thank those who contributed to this issue. As we are a bi-annual publication, there are some important issues to advertise before the next year’s issues are formed. The editorial board is populated on an annual rolling basis, and therefore there will be advertisements soon regarding applications for the roles of Associate Editor, General Secretary, and Social Media Secretary. The Editor-in-Chief would like to take this opportunity to thank Jake Richardson (Deputy Editor) and Simranpreet Pannu (Social Media Secretary) for their efforts and support for this fourth issue.

Dr Daniel Cash Editor-in-Chief

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# Fraud, Bribery, and Corruption

#### Revisiting the Fraud Triangle in the Curious Case of Bernie Madoff

*Amarjit Tark*

#### Introduction

The Fraud Triangle Theory is used by auditors to understand why people commit fraud.1 For a fraudster’s conduct to meet the standards set by the Fraud Triangle Theory, the elements of rationalization, pressure and opportunity must be present.2 The theory was designed by Cressey towards his research on embezzlement behaviour.3 Therefore, implying that this theory is restricted to detecting the criminal violations of trusts where the fraudster has committed the crime of embezzlement.4 The essay will argue that the Fraud Triangle Theory is an inadequate method which fails to encapsulate and engage in dealing with every occurrence of fraud.5 To prove this, the essay will use the Madoff Scandal as evidence to explore why the theory cannot provide an explanation to fraudsters who commit Ponzi-Schemes. In this context,

1 In contrast to the views of Mark in Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201,203 and 205.

2 Read Donald R. Cressey, ‘The Criminal Violation of Financial Trust’ (1950) 15(6) ASR 738,742 and Michele Machado and Ivan R. Gartner, ‘The Cressey hypothesis (1953) and an investigation into the occurrence of corporate fraud: an empirical analysis conducted in Brazilian banking institutions’ (2017) 29(76) Rev.Contab Financ 60, 64 and 65.

3 Jack Dorminey, A. Scott Fleming, Mary-Jo Kranacher and Richard A. Riley Jr, ‘The Evolution of Fraud Theory: Issues in Accounting Education’ (2012) 27(2) American Accounting Association 555, 557 and 558.

4 Ibid.

5 Read Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201, 204 where Mark uses the Critical Discourse Analysis to argue that the fraud triangle is not an adequate tool for detecting fraud.

Madoff conducted fraudulent transfers through a Ponzi-scheme which allowed his business to operate by distributing proceeds from new investors to old investors.6 Thus, Madoff created a false image that illustrated that his business was profitable.7 Lastly, the essay will argue that the US policy makers have failed to allow private litigants to prosecute secondary violators who are ‘sophisticated investors’ that may have played a part in expanding Madoff’s Ponzi-scheme.

#### The Fraud Triangle Theory in the Madoff Scandal

1. ***Did Madoff have the pressure to commit fraud?***

Cressey describes the notion of pressure to take place where there is a non- shareable financial problem, which prompts the individual to commit fraud.8 However, this view is contested by the accountant Lokanan who questions the integrity of pressure where the alleged fraudster steals items “worth just a fraction of the millions of dollars that person had earned in salary, bonuses and stock options”.9 This criticism adds to the discussion on whether Madoff had the pressure to commit the Ponzi-scheme in the first place. This is because, prior to the unlawful conduct, Madoff had consistent returns of 15%

6 Kenley KJ, 'Can We Keep This Dirty Money: Ponzi Scheme Transfers and the Fourth Circuit's Vague but Workable Standard in re Derivium Capital, LLC.' (2014) 92(4) NC L Rev 1370, 1377.

7 Ibid.

8 Read Gerald D. Robin, ‘The Nonshareable Problem Theory of Trust Violation.’ (1970) 7(4) Criminologica 50, 53. See Donald R. Cressey, ‘The Criminal Violation of Financial Trust’ (1950) 15(6) ASR 738,743 and Jack Dorminey, A. Scott Fleming, Mary-Jo Kranacher and Richard A. Riley Jr, ‘The Evolution of Fraud Theory: Issues in Accounting Education’ (2012) 27(2) American Accounting Association 555, 557 and 558.

9 Read Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201, 241 and see comparison of pressure in *Walmart Stores Inc v*

*Thomas M. Coughlin*, 255 S.W.3d 424, 432, 369 Ark. 365 (2007). See Table 1-1: Summary of the Cases in Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201, 237 and Read *Securities and Exchange Commission v Scott London and Bryan Shaw* (2013), CV13 – 02558 for a similar example of where the element of pressure was questioned to take place.

to 20%10 and during the market crash in the late 1980s, many believed Madoff still had the ability to continue providing returns of high profits he had boasted through that period.11 Thus, Madoff was financially secure amidst a time where his main competitors in the relevant market were struggling to stay afloat. However, it is recognised that Madoff did struggle to generate sufficient profits to cover the returns for investors and this may have triggered pressure to engage in a Ponzi-scheme by paying his old investors with the money generated from the new investors.12 However, the extent of this pressure that transpired the fraudulent scheme can be challenged. For instance, the pressure of meeting the Wall Street forecast is a fundamental motive limited to publicly traded companies and failing to meet this forecast may encourage them to engage in a financial statement fraud.13 In contrast, BLMIS was a privately-traded company. Therefore, it can be argued that Madoff did not have enough internal and external economic pressure to carry out the conduct in comparison to the pressure on publicly-traded companies. This is because only a handful of investors that chose to invest their money with Madoff at that time would have lost their money had Madoff not decided to commit the fraud to cover up the losses incurred from the market crash.14 Secondly, Braithwaite asserts that pressure could take place where middle

10 Walter Pavlo, ‘Bernard Madoff Is The Fraud Triangle’ (Forbes, 1 March 2011) < https://[www.forbes.com/sites/walterpavlo/2011/03/01/bernard-madoff-is-the-fraud-](http://www.forbes.com/sites/walterpavlo/2011/03/01/bernard-madoff-is-the-fraud-) triangle/#28be4d246cad> accessed 23 February 2019.

11 Bryce Cullinane, ‘Assessing Irving Picard's Writ of Certiorari in Picard v. JP Morgan Chase: Another Chapter in the Saga of Bernie Madoff and His Impact on the Securities Industry’ (2014) 8(1) J Bus Entrepreneurship & L 287, 297

12 Mohammad I. Azim and Saiful Azam, ‘‘Bernard Madoff’s ‘Ponzi Scheme’: Fraudulent behaviour and the Role of Auditors’ (2016) Accountancy Business and the Public Interest 122, 128.

13 Rezaee Z, ‘Causes, consequences and deterrence of financial statement fraud. Critical Perspectives on Accounting’ (2005) 16. Critical Perspectives on Accounting 277, 283.

14 ibid 277, 295.

managers in the firm are squeezed by a choice between failing to achieve the targets made by top management and attaining these target illegally.15 In contrast, Madoff had the highest position in the company. Thus, there was no pressure for him to meet the targets as no one was setting the targets for him in the first place. This shows another flaw with the Fraud Triangle Theory as the Non-Shareable Financial Problem has been redefined to only endorse the idea that individuals who are subject to situational pressure will commit fraud.16 Therefore, restricting the explanation of a fraudster’s conduct, where pressure was by far the least possible motive for committing fraud.17 Thus, rather than financial pressure, there was a strong sense of ego and pride towards results as Madoff was ‘too ashamed to show bad performance’ which led him to produce false trade reports.18 Furthermore, the lure of greed may have played a mitigating factor and since Madoff had greater power and wealth in his respective sector, his position may have demanded greater expression

15 Hirschi T and Gottfredson M, 'Causes of White-Collar Crime.' (1987) 25(4) Criminology 949, 956 and Pamela R. Murphy and M. Tina Dacin, ‘Psychological Pathways to Fraud: Understanding and Preventing Fraud in Organizations’ (2011) 101(4) Journal of Business Ethics 601, 605.

16 Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201, 239 and 240. See Jérémy Morales, Yves Gendron and Henri Guénin- Paracini ‘The construction of the risky individual and vigilant organization: A genealogy of the fraud triangle’ (2014) 39(3) Accounting, Organizations and Society 170, 182.

17 Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201, 239 and 242. See Example of a Predatory Fraudster; See Example in Jonathan Stempel, ‘Ex-KPMG partner London gets 14 months for insider trading’ (Reuters, 24 April 2014) <[https://www.reuters.com/article/us-kpmg-insidertrading-sentencing-](https://www.reuters.com/article/us-kpmg-insidertrading-sentencing-idUSBREA3N22120140424) [idUSBREA3N22120140424](https://www.reuters.com/article/us-kpmg-insidertrading-sentencing-idUSBREA3N22120140424)> accessed 8 April 2019.

18 See Bryce Cullinane, ‘Assessing Irving Picard's Writ of Certiorari in Picard v. JP Morgan Chase:

Another Chapter in the Saga of Bernie Madoff and His Impact on the Securities Industry’ (2014) 8(1) J Bus Entrepreneurship & L 287, 298 and pressure in the context of the fraudsters perception of social stigma in the fraud triangle theory in Jack Dorminey, A. Scott Fleming, Mary-Jo Kranacher and Richard A. Riley Jr, ‘The Evolution of Fraud Theory: Issues in Accounting Education’ (2012) 27(2) American Accounting Association 555, 558. See Financial statement fraud in Rezaee Z, ‘Causes, consequences and deterrence of financial statement fraud’ (2005) 16 Critical Perspectives on Accounting 277, 283.

of greed.19 Thus, he may have viewed the Ponzi-scheme as a more profitable route to making money on a larger scale in the current market phase and prior to this, when the financial stability in the market was unhealthy.

1. ***Did Madoff have the opportunity to commit the fraud***

Perceived opportunity takes place where the fraudster has the ability to commit fraud without detection through use of their influence; resources and knowledge to create a trust with the victim.20 To begin with, Madoff’s reputation in the relevant market21, the aura surrounding his family’s accomplishment within the financial sector22, and the contribution he made to the society through donations to charities and politicians23 bought him respect from regulators and access to powerful, wealthy investors.24 Under the accountancy discipline, Madoff had also built relationships with his clients

19 See Mohammad I. Azim and Saiful Azam, ‘‘Bernard Madoff’s ‘Ponzi Scheme’: Fraudulent behaviour and the Role of Auditors’ (2016) Accountancy Business and the Public Interest 122, 128 and the “needs and greeds” theory conceived by Braithwaite in Watson D.M, Cross-cultural interpretations of fraud: An attitudinal study in a Middle Eastern multinational corporation (PhD in Applied Management and Decision Sciences, Walden University 2000) 52.

20 Jack Dorminey, A. Scott Fleming, Mary-Jo Kranacher and Richard A. Riley Jr, ‘The Evolution

of Fraud Theory: Issues in Accounting Education’ (2012) 27(2) American Accounting Association 555, 558, Steven Dellaportas, ‘Conversations with inmate accountants: Motivation, opportunity and the fraud triangle’ (2013) 37 Accounting Forum 29, 31 and 32,Michele Machado and Ivan R. Gartner, ‘The Cressey hypothesis (1953) and an investigation into the occurrence of corporate fraud: an empirical analysis conducted in Brazilian banking institutions’ (2017) 29(76) Rev.Contab Financ 60, 64 and Donald R. Cressey, ‘The Criminal

Violation of Financial Trust’ (1950) 15(6) ASR 738,743

21 “i.e his post as a chairman of NASDAQ in the past” in Smith F, 'Madoff Ponzi Scheme Exposes the Myth of the Sophisticated Investor.' (2010) 40(2) U Balt L Rev 215 255, 256, 263 and 264.

22 Peter Madoff was the form vice chairman at FINRA; Chew R, ‘A Madoff Whistle-Blower Tells His Story’ (TIME, 4 February 2009) < [http://content.time.com/time/business/article/0,8599,1877181,00.html](http://content.time.com/time/business/article/0%2C8599%2C1877181%2C00.html)> accessed 19 November 2018

23 See Mohammad I. Azim and Saiful Azam, ‘‘Bernard Madoff’s ‘Ponzi Scheme’: Fraudulent behaviour and the Role of Auditors’ (2016) Accountancy Business and the Public Interest 122, 124.

24 See Mohammad I. Azim and Saiful Azam, ‘‘Bernard Madoff’s ‘Ponzi Scheme’: Fraudulent behaviour and the Role of Auditors’ (2016) Accountancy Business and the Public Interest 122, 128 and 129 and Weiner AS, 'Net Equity Only Comes with Net Equality: An Exploration of an Alternative Remedy for Victims of Ponzi Schemes.' (2012) 84(2) Temp L Rev 523, 527.

through a ‘characteristic-based trust’25 which involves engagement with people that share similar characteristics with the person.26 It follows that Madoff had used this trust to commit affinity fraud by targeting the Jewish community and other likeminded organisations.27 This allowed him to recruit clients in both quantity and quality that were reputed and had adequate resources to facilitate his fraudulent scheme.28

‘Process-based trust’29 showcased two major selling points that placed emphasis on Madoff’s past track record of high returns and the stability of these returns.30 This also contributed in attracting investors but challenges the position of whether there was an on-going pressure for Madoff to continue committing fraud and maintaining his business. This is because the development of these trusts produced an environment where the society witnessed its friends; relatives and colleagues making a lot of money. This may have made them greedy and therefore encouraged to invest in Madoff

25 Lynne G Zucker, ‘Production of Trust: Institutional Sources of Economic Structure, 1840- 1920’ (1986) 8 Research in Organizational Behaviour 53.

26 Herve Stolowy, ‘Information, trust and the limits of “intelligent accountability” in investment decision making: Insights from the Madoff case’ (2011) HEC Research Papers Series 956, 969 HEC Paris

27 Ibid. See Smith F, 'Madoff Ponzi Scheme Exposes the Myth of the Sophisticated Investor.' (2010) 40(2) U Balt L Rev 215, 229.

28 Mohammad I. Azim and Saiful Azam, ‘‘Bernard Madoff’s ‘Ponzi Scheme’: Fraudulent behaviour and the Role of Auditors’ (2016) Accountancy Business and the Public Interest 122, 128 and 129.

29 Lynne G Zucker, ‘Production of Trust: Institutional Sources of Economic Structure, 1840- 1920’ (1986) 8 Research in Organizational Behaviour 53.

30 Herve Stolowy, ‘Information, trust and the limits of “intelligent accountability” in investment decision making: Insights from the Madoff case’ (2011) HEC Research Papers Series 956, 970 and 971 HEC Paris.

without him approaching them.31 Thus, Madoff did not have difficulties and therefore no pressure in attracting such investors to expand on his scheme.32

‘Institutional based-trust’33 operates through reliance on the power of institutions in the form of law and regulations, certificates or professions. Madoff used this trust to give a false pretence to the investors that there was a proper functioning of economic exchanges.34 Avoiding suspicions or investor’s doubts that may have arisen after a due-diligence was carried out on the fraudulent scheme.35 For instance, the investors relied on the SEC ‘s investigation on Madoff’s scheme and found no abnormalities with it36, although it is open to dispute that the cause of this was due to the incompetence of the SEC in dealing with the matter through means of a weak

31 Mohammad I. Azim and Saiful Azam, ‘‘Bernard Madoff’s ‘Ponzi Scheme’: Fraudulent behaviour and the Role of Auditors’ (2016) Accountancy Business and the Public Interest 122, 128 and 129

32 Ibid.

33 Lynne G Zucker, ‘Production of Trust: Institutional Sources of Economic Structure, 1840- 1920’ (1986) 8 Research in Organizational Behaviour 53.

34 Herve Stolowy, ‘Information, trust and the limits of “intelligent accountability” in investment decision making: Insights from the Madoff case’ (2011) HEC Research Papers Series 956, 973 HEC Paris. US Securities and Exchange Commission, Office of Investigations: Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme – Public Version – (Report No. OIG-509, August 31, 2009) 25 and 427 and Van de Bunt, H., ‘Walls of secrecy and silence: the Madoff case and cartel in the construction industry’ (2010) 9(3) Criminology and Public Policy’ 435 analogy on Rebecca Nash, Martin Bouchard & Aili Malm, ‘Twisting trust: social networks, due diligence, and loss of capital in a Ponzi scheme’ (2018) 69(1) Crime Law Soc Change 67, 71.

Herve Stolowy, ‘Information, trust and the limits of “intelligent accountability” in investment decision making: Insights from the Madoff case’ (2011) HEC Research Papers Series 956, 974 HEC Paris. US Securities and Exchange Commission, Office of Investigations: Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme – Public Version – (Report No. OIG-509, August 31, 2009) 425.

35 Herve Stolowy, ‘Information, trust and the limits of “intelligent accountability” in investment

decision making: Insights from the Madoff case’ (2011) HEC Research Papers Series 956, 973 HEC Paris. US Securities and Exchange Commission, Office of Investigations: Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme – Public Version – (Report No. OIG-509, August 31, 2009) 25 and 427.

36 Herve Stolowy, ‘Information, trust and the limits of “intelligent accountability” in investment decision making: Insights from the Madoff case’ (2011) HEC Research Papers Series 956, 974 HEC Paris. US Securities and Exchange Commission, Office of Investigations: Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme – Public Version – (Report No. OIG-509, August 31, 2009) 425.

internal control and inadequate resources37 to carry out an effective investigation.38 This is because of Madoff’s personal ties to the SEC chairman and lower level connections made through Madoff’s niece who married a SEC attorney. This attorney had a supervisory role in the Madoff scandal and was previously part of a board that hindered the pursuance of the scandal in the initial SEC investigation.39

The assumption of a conflict of interest indicates a flaw within the Fraud Triangle Theory as Dellaportas rightly notes: “opportunity carries a number of dimensions which the theory fails to explain within the accounting profession.”40 Lokanan expands on this by arguing that the theory restricts itself to analysing the behaviour of a single individual.41 Thus, it lacks the ability to explain the occurrence of any potential conduct which may amount to a collusion between individuals within an organisation or with organisations who commit fraud.42 For instance, E & Y’s collusion with Lehman Brothers breached the accounting rules in order to produce favourable financial

37 US Securities and Exchange Commission, Office of Investigations: Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme – Public Version – (Report No. OIG-509, August 31, 2009) 36.

38 Langevoort DC, 'The SEC and the Madoff Scandal: Three Narratives in Search of a Story.' (2009) (4) Mich St L Rev 899, 913.

39 Langevoort DC, 'The SEC and the Madoff Scandal: Three Narratives in Search of a Story.' (2009) (4) Mich St L Rev 899, 904 and See Goldfarb Z.A, ‘SEC Lawyer Raised Madoff Concerns but Was Rebuffed’ (LA Times, 2 July 2009) < https://notices.californiatimes.com/gdpr/latimes.com/ > accessed 24 November 2018. Also read Report based on Madoff Investment Securities from Harry Markopoulos to the SEC (7 November 2005) < https://[www.sec.gov/news/studies/2009/oig-509/exhibit-0293.pdf](http://www.sec.gov/news/studies/2009/oig-509/exhibit-0293.pdf) > accessed 6 December 2018 and US Securities and Exchange Commission, Office of Investigations: Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme

– Public Version – (Report No. OIG-509, August 31, 2009) 20.

40 Steven Dellaportas, ‘Conversations with inmate accountants: Motivation, opportunity and the fraud triangle’ (2013) 37 Accounting Forum 29, 37.

41 Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201, 245.

42 Ibid 201, 247.

statements for the stakeholders.43 The fraud was not carried out by the actions of a single misguided individual but by individuals working together within the organisation and across organisation to form a tacit agreement which allowed the auditors to turn a blind eye on the fraud.44 In the Madoff Scandal, a similar collusion took place as BLMIS colluded with Friehling & Horowitz which was an accounting firm. The auditors would stamp documents which falsely declared that the financial statements were audited accordingly to GAAS and the US GAAP.45 This deceived and misled investors into buying into his scheme as it disrupted the audit trial which left a ‘no tell-tale evidence’ of a Ponzi-scheme.46 Lastly, Madoff’s position in the firm provided him with the opportunity to engage in fraud due to his firm’s internal control deteriorating, making corporate governance less effective to tailor the continuance of his Ponzi-scheme without any hindrance.47 This was further supported through

43 See Reuters, ‘Ernst & Young settles with N.Y. for $10 million over Lehman auditing’ (Fortune, 15 April 2015) < [http://fortune.com/2015/04/15/ernst-young-settles-with-ny-for-10-million-](http://fortune.com/2015/04/15/ernst-young-settles-with-ny-for-10-million-over-lehman-auditing/) [over-lehman-auditing/](http://fortune.com/2015/04/15/ernst-young-settles-with-ny-for-10-million-over-lehman-auditing/)> accessed 25th November 2018. See Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201, 246. Also see cases on collusion in (Case 48/69) *Imperial Chemical Industries (ICI) v Commission (Dyestuffs)* [1972] CMLR 557 and (Cases C-89/85, C-104/85, C-114/85, C116–117/85 & C125–129/85)

*A. Ahlström OY and Others v. E.C. Commission (Wood Pulp II)* [1993] 4 CMLR 407.

44 See Blake E. Ashforth and Vikas Anand, ‘THE NORMALIZATION OF CORRUPTION IN ORGANIZATIONS’ (2003) 25 Research in Organizational Behaviour 1,11 and Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201, 246 and 247.

45 Mohammad I. Azim and Saiful Azam, ‘‘Bernard Madoff’s ‘Ponzi Scheme’: Fraudulent behaviour and the Role of Auditors’ (2016) Accountancy Business and the Public Interest 122,

128. US Securities and Exchange Commission, Office of Investigations: Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme – Public Version – (Report No. OIG-509, August 31, 2009) 30.

46 Steven Dellaportas, ‘Conversations with inmate accountants: Motivation, opportunity and the fraud triangle’ (2013) 37 Accounting Forum 29, 31 and 32. Read Sridhar Ramamoorti,’ The Psychology and Sociology of Fraud:

Integrating the Behavioral Sciences Component Into Fraud and Forensic Accounting Curricula’ (2008) 23(4) ISSUES IN ACCOUNTING EDUCATION 521, 526.

47 Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201, 210 and 211 and Rezaee Z, ‘Causes, consequences and deterrence of financial statement fraud’ (2005) 16 Critical Perspectives on Accounting 277, 295.

the lack of allocating roles considered to be integral in operating and controlling the hedge fund restricted into being monitored by a single individual in the firm. This individual was Madoff himself.48

1. ***Did Madoff’s have rationalisation to commit the fraud?***

Rationalisation is psychologically rooted as a cognitive mechanism process of self- justification. It is used by a fraudster who does not view themselves as a criminal.49 Therefore, mentally determining their fraudulent behaviour to be acceptable and justifiable with their personal code of ethics to resolve a non-shareable problem.50 To find Madoff’s justification, Murphy and Dacin’s work51 on psychology pathways to fraud will be applied, which similar to the Fraud Triangle Theory is built around the conduct of the ‘accidental fraudster’.52 This type of fraudster is perceived to be a good citizen, experiences a non-shareable financial problem, and where this is attached to opportunity and rationalisation, the fraudster would go against their beliefs to commit fraud.53 It follows, that the accidental fraudster would never consider breaking law or harm others, but when they consider committing fraud, they

48 Mohammad I. Azim and Saiful Azam, ‘‘Bernard Madoff’s ‘Ponzi Scheme’: Fraudulent behaviour and the Role of Auditors’ (2016) Accountancy Business and the Public Interest 122, 128 and 129.

49 Mary-Jo Kranancher, Richard Riley,. Joseph T Wells, *Forensic Accounting and Fraud Examination* (Wiley, 2010) 66

50 Michele Machado and Ivan R. Gartner, ‘The Cressey hypothesis (1953) and an investigation into the occurrence of corporate fraud: an empirical analysis conducted in Brazilian banking institutions’ (2017) 29(76) Rev.Contab Financ 60, 64, Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201, 213, Steven Dellaportas, ‘Conversations with inmate accountants: Motivation, opportunity and the fraud triangle’ (2013) 37 Accounting Forum 29, 32 and Donald R. Cressey, ‘The Criminal Violation of Financial Trust’ (1950) 15(6) ASR 738,743.

51 Murphy and M. Tina Dacin, ‘Psychological Pathways to Fraud: Understanding and Preventing

Fraud in Organizations’ (2011) 101(4) Journal of Business Ethics 601.

52 Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201, 252 and Murphy and M. Tina Dacin, ‘Psychological Pathways to Fraud: Understanding and Preventing Fraud in Organizations’ (2011) 101(4) Journal of Business Ethics 601,602, 603 and 604.

53 Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201, 251. Jack Dorminey, A. Scott Fleming, Mary-Jo Kranacher and Richard

A. Riley Jr, ‘The Evolution of Fraud Theory: Issues in Accounting Education’ (2012) 27(2) American Accounting Association 555, 565.

would try to justify their actions prior to it.54 To begin with, Madoff was aware that his behaviour was fraudulent.55 This is because a person who runs a Ponzi scheme knows that his future investors will lose their money.56 The next question is whether Madoff had the affect laden intuition to commit fraud.57 Moral intuition is defined by Haidth as the consciousness of a moral judgement made without taking steps of searching, weighing evidence, or inferring a conclusion.58 Thus, it is contested that Madoff may have instantly felt approval of committing the fraudulent scheme as he did not try other options that were considered acceptable.59 This is supported through comparison of Madoff’s financial situation in the 1980s and that of a business facing a similar situation and where the distinction was the latter’s intuition led it to perceive committing fraud as unacceptable and so they did not commit fraud due to their guts telling them not to.60 For instance, in the 2008 financial crisis, Starbucks had to close 1000 stores and experienced a 28% profit loss over the next 2 years. However, instead of thinking to commit the fraud to make up for the losses, it choose to tackle the situation by implementing a new business strategy.61

54 Jack Dorminey, A. Scott Fleming, Mary-Jo Kranacher and Richard A. Riley Jr, ‘The Evolution of Fraud Theory: Issues in Accounting Education’ (2012) 27(2) American Accounting Association 555, 565., and Mary-Jo Kranancher, Richard Riley,. Joseph T Wells, *Forensic Accounting and Fraud Examination* (Wiley, 2010) 66

55 Pamela Murphy and M. Tina Dacin, ‘Psychological Pathways to Fraud: Understanding and Preventing Fraud in Organizations’ (2011) 101(4) Journal of Business Ethics 601,604.

56 Bayou Accredited Fund, LLC v. Redwood Growth Partners, L.P. (In re Bayou Group, LLC) 396 B.R. 810, 835 (Bankr. S.D.N.Y. 2008) para 23.

57 Pamela Murphy and M. Tina Dacin, ‘Psychological Pathways to Fraud: Understanding and Preventing Fraud in Organizations’ (2011) 101(4) Journal of Business Ethics 601,607.

58 Jonathan Haidt, ‘The emotional dog and its rational tail: A social intuitionist approach to moral judgment’ (2001) 108(4) Psychological review 814, 818 and Murphy and M. Tina Dacin, ‘Psychological Pathways to Fraud: Understanding and Preventing Fraud in Organizations’ (2011) 101(4) Journal of Business Ethics 601,607.

59 Jonathan Haidt, ‘The emotional dog and its rational tail: A social intuitionist approach to moral judgment’ (2001) 108(4) Psychological review 814, 818

60 Pamela Murphy and M. Tina Dacin, ‘Psychological Pathways to Fraud: Understanding and Preventing Fraud in Organizations’ (2011) 101(4) Journal of Business Ethics 601,607.

61 Parrick Mikaela, ’11 Coporate Turnaround Success Stories’ (Brown & Joseph, 6 March 2018)

< <https://brownandjoseph.com/blog/11-turnaround-success-stories/>> accessed 23 February 2019.

Madoff’s intuition led him to believe that his behaviour was acceptable. He was able to rationalise his behaviour.62 He did this through moral justification, referring to the re-interpretation of unacceptable behaviour made to achieve a higher purpose by arguing that the entire system is corrupt.63 Thus, Madoff believed that the Wall Street was ‘rigged against the little guy’ and that he wanted ‘to get even’ against the financial market.64 Another rationalisation tactic used by Madoff was the ‘Denial of Injury’, a notion formulated in the fraudsters mind that no-one was harmed by their actions.65 He tried denying injury by stating that he had only targeted rich investors and so none of them would have faced poverty had their investment failed.66 Lastly, there was a ‘denial of responsibilities’. This form of justification is used by fraudsters who blame the victim for the losses and was used by Madoff to contest that the banks

62 Pamela Murphy and M. Tina Dacin, ‘Psychological Pathways to Fraud: Understanding and Preventing Fraud in Organizations’ (2011) 101(4) Journal of Business Ethics 601,607 and 608.

63 Pamela Murphy and M. Tina Dacin, ‘Psychological Pathways to Fraud: Understanding and Preventing Fraud in Organizations’ (2011) 101(4) Journal of Business Ethics 601,610.

64 Walter Pavlo, ‘Bernard Madoff Is The Fraud Triangle’ (Forbes, 1 March 2011) < https://[www.forbes.com/sites/walterpavlo/2011/03/01/bernard-madoff-is-the-fraud-](http://www.forbes.com/sites/walterpavlo/2011/03/01/bernard-madoff-is-the-fraud-) triangle/#28be4d246cad> accessed 23 February 2019, Mohammad I. Azim and Saiful Azam, ‘‘Bernard Madoff’s ‘Ponzi Scheme’: Fraudulent behaviour and the Role of Auditors’ (2016) Accountancy Business and the Public Interest 122, 130 and Hudson John, ‘Madoff's Most Astounding Rationalizations’ (The Atlantic, 28 February 2011) < [https://www.theatlantic.com/business/archive/2011/02/madoff-s-most-astounding-](https://www.theatlantic.com/business/archive/2011/02/madoff-s-most-astounding-rationalizations/342080/) [rationalizations/342080/](https://www.theatlantic.com/business/archive/2011/02/madoff-s-most-astounding-rationalizations/342080/)> (Accessed 1 March 2019)

65 Pamela Murphy and M. Tina Dacin, ‘Psychological Pathways to Fraud: Understanding and

Preventing Fraud in Organizations’ (2011) 101(4) Journal of Business Ethics 601,611 and Steven Dellaportas, ‘Conversations with inmate accountants: Motivation, opportunity and the fraud triangle’ (2013) 37 Accounting Forum 29, 36.

66 Mohammad I. Azim and Saiful Azam, ‘‘Bernard Madoff’s ‘Ponzi Scheme’: Fraudulent behaviour and the Role of Auditors’ (2016) Accountancy Business and the Public Interest 122, 130; Contrast see Smith F, 'Madoff Ponzi Scheme Exposes the Myth of the Sophisticated Investor.' (2010) 40(2) U Balt L Rev 215, 234 where it is reported that “Madoff's investors also included "hundreds of ordinary retail investors."

and funds that he tricked, should have been aware about the fraud due to their profession in the financial sector.67

Murphy and Dacin rightfully conclude their test by stating that individuals that can rationalize their conduct will have no hesitation in continuing to commit fraud while still upholding their moral values.68 In that regard, Dorminey argues that if fraud takes place for a long duration, the rationalisation may be abandoned or cognitively dismissed.69 This was the case with Madoff’s Ponzi scheme which could only function as long as Madoff repeated the act of taking money from investors.70 This indicates that the rationalisation provided by Madoff displays a criminal thinking that involves attitude and values which supports a criminal lifestyle through justifying law-breaking behaviours.71 This further illustrates potential psychopathic and narcissism traits present in Madoff which may suggest that he was a predatory fraudster.72 For instance, narcissism attaches itself to low personal integrity which corresponds to traits such as; exploitation and entitlement.73 The latter was taken to the extreme by

67 Steven Dellaportas, ‘Conversations with inmate accountants: Motivation, opportunity and the fraud triangle’ (2013) 37 Accounting Forum 29, 36, Murphy and M. Tina Dacin, ‘Psychological Pathways to Fraud: Understanding and Preventing Fraud in Organizations’ (2011) 101(4) Journal of Business Ethics 601,611, Mohammad I. Azim and Saiful Azam, ‘‘Bernard Madoff’s ‘Ponzi Scheme’: Fraudulent behaviour and the Role of Auditors’ (2016) Accountancy Business and the Public Interest 122, 130 and ‘Madoff's Most Astounding Rationalizations’ (The Atlantic, 28 February 2011) < [https://www.theatlantic.com/business/archive/2011/02/madoff-s-most-astounding-](https://www.theatlantic.com/business/archive/2011/02/madoff-s-most-astounding-rationalizations/342080/) [rationalizations/342080/](https://www.theatlantic.com/business/archive/2011/02/madoff-s-most-astounding-rationalizations/342080/)> (Accessed 1 March 2019).

68 Pamela Murphy and M. Tina Dacin, ‘Psychological Pathways to Fraud: Understanding and

Preventing Fraud in Organizations’ (2011) 101(4) Journal of Business Ethics 601,613.

69 Jack Dorminey, A. Scott Fleming, Mary-Jo Kranacher and Richard A. Riley Jr, ‘The Evolution of Fraud Theory: Issues in Accounting Education’ (2012) 27(2) American Accounting Association 555, 566.

70 Jack Dorminey, A. Scott Fleming, Mary-Jo Kranacher and Richard A. Riley Jr, ‘The Evolution of Fraud Theory: Issues in Accounting Education’ (2012) 27(2) American Accounting Association 555, 566.

71 Frank S. Perri, ‘Visionaries or False Prophets’ (2013) 29(3) Journal of Contemporary Criminal Justice 331, 333.

72 Kim Klarskov Jeppesen and Christina Leder, ‘Auditors' Experience with Corporate Psychopaths’ (2016) 23(4) Journal of Financial Crime 870, 876.

73 Frank S. Perri, ‘Visionaries or False Prophets’ (2013) 29(3) Journal of Contemporary Criminal Justice 331, 335

Madoff who did not fear getting caught.74 This was due to his ability of evading the SEC for decades which gave him an ‘intoxicating’ experience that delivered a sense of entitlement and grandiosity.75 On the other hand, the psychopathic trait of impression management were made evident in Madoff’s conduct, who used his cordial behaviour to build trust with the investors and manipulate them into a false sense of security by constructing a wall of false integrity.76 Thus, the archetype of the fraudster Madoff had become after continuously committing the Ponzi-scheme, exposes a flaw with the Fraud Triangle Theory. This is because a predatory fraudster does not need pressure and rationalisation to commit fraud.77 All Madoff needed was the opportunity where the chance of committing fraud and getting caught was low.78

**The Enforcement Gap in Law**

Family, auditors, and banks are alleged to have been involved with the Madoff Scandal.79 However, investors are rarely held to be account on the same accord by academics who broadly characterise investors as victims of Madoff. This view is weak as it restricts the alleged involvement of certain individuals considered to be ‘sophisticated investors’. These investors have the financial expertise and resources to gain access to information which they deem to be

74 Frank S. Perri, ‘Visionaries or False Prophets’ (2013) 29(3) Journal of Contemporary Criminal Justice 331, 333 and Bucy PH and Formby EP and Raspanti MS and Rooney KE, 'Why Do They Do It: The Motives, Mores, and Character of White Collar Criminals.' (2008) 82(2) St John's L Rev 401, 417.

75 Frank S. Perri, ‘Visionaries or False Prophets’ (2013) 29(3) Journal of Contemporary Criminal Justice 331, 333

76 Frank S. Perri, ‘Visionaries or False Prophets’ (2013) 29(3) Journal of Contemporary Criminal Justice 331, 341.

77 Mark Lokanan, ‘Challenges to the fraud triangle: Question on its usefulness’ (2015) 39(3) Accounting Forum 201,251

78 See analysis of whether Madoff had the opportunity to commit the fraud.

79 See Jonathan Stempel, ‘JPMorgan wins dismissal of Madoff investors' U.S. lawsuit’ (Reuters,

18 May 2016) < <https://www.reuters.com/article/us-jpmorgan-madoff-idUSKCN0Y92IK>> Dated accessed 28/4/19 and Erik Larson, ‘The Madoff Players: Where Are They Now?’ (Bloomberg, 11 December 2018) < [https://www.bloomberg.com/news/articles/2018-12-](https://www.bloomberg.com/news/articles/2018-12-11/the-bernie-madoff-ponzi-scheme-who-s-where-now) [11/the-bernie-madoff-ponzi-scheme-who-s-where-now](https://www.bloomberg.com/news/articles/2018-12-11/the-bernie-madoff-ponzi-scheme-who-s-where-now)> Date Accessed 28/4/19

important for their investment decisions.80 Therefore, they are able to fend for themselves in the capital market.81 For instance, a hedge fund manager convinced a charity to withdraw their investment from Madoff after failing to replicate Madoff’s strategy.82 This illustrates a situation where, unbeknownst to Madoff and other innocent investors, these sophisticated investors could potentially use their resources and expertise in the field to replicate the scheme, find red flags which indicates that their investments are used to sustain a Ponzi scheme and then take advantage of this by investing double the amount of money. This is because, they now know that their investment will not fail, and it is certain that good returns will be made.83 Thus, these investors are committing securities fraud. This is because a Ponzi-scheme requires a steady flow of income to stay afloat and where more money is invested to it, the bigger the scheme becomes. 84 It follows that more innocent new and current investors are then targeted by Madoff to maintain his operation and when the scheme is exposed, a lot of people would lose out on their investments.

80 Smith F, 'Madoff Ponzi Scheme Exposes the Myth of the Sophisticated Investor.' (2010) 40(2) U Balt L Rev 215

81 See Section 4(a)(2) of the Securities Act 1933 and Smith F, 'Madoff Ponzi Scheme Exposes the Myth of the Sophisticated Investor.' (2010) 40(2) U Balt L Rev 215, 243.

82 Smith F, 'Madoff Ponzi Scheme Exposes the Myth of the Sophisticated Investor.' (2010) 40(2) U Balt L Rev 215, 260

83 Report based on Madoff Investment Securities from Harry Markopoulos to the SEC (7 November 2005) < https://[www.sec.gov/news/studies/2009/oig-509/exhibit-0293.pdf](http://www.sec.gov/news/studies/2009/oig-509/exhibit-0293.pdf) > accessed 6 December 2018 and Weiner AS, 'Net Equity Only Comes with Net Equality: An Exploration of an Alternative Remedy for Victims of Ponzi Schemes.' (2012) 84(2) Temp L Rev 523, 552.

84 Melissa C. Nunziato, ‘Aiding and Abetting, a Madoff Family Affair: Why Secondary Actors Should Be Held Accountable for Securities Fraud through the Restoration of the Private Right of Action for Aiding and Abetting Liability under the Federal Securities Laws’ (2010) 73 Alb. L. Rev 603, 607.

A legal recourse to deal with this issue effectively is through private litigants who seek damages from individuals that may have played a part in the scandal.85 Nunziato rightly notes that private litigants are restricted from using the statutory provision set under SEC Rule 10b-586 that could prosecute these ‘sophisticated investors’ as ‘secondary actors’ who allegedly carry out manipulative and deceptive practices.87 This is because secondary actors are those individuals that do not commit the primary violations which requires a actionable public misstatement or an omission made to which the innocent investor relied upon under the federal securities law.88 On the contrary, a secondary violator’s role may not derive from an agreement89, but aid and abet primary violators whilst having the knowledge or awareness that they are

85 Melissa C. Nunziato, ‘Aiding and Abetting, a Madoff Family Affair: Why Secondary Actors Should Be Held Accountable for Securities Fraud through the Restoration of the Private Right of Action for Aiding and Abetting Liability under the Federal Securities Laws’ (2010) 73 Alb.

L. Rev 603, 615 and 616. **Note: “The SEC has the power to prosecute secondary violators**

**for aiding and abetting. However, they lack the resources to detect and investigate fraud**

 **violation making them ineffective in this instances” at** Melissa C. Nunziato, ‘Aiding and Abetting, a Madoff Family Affair: Why Secondary Actors Should Be Held Accountable for Securities Fraud through the Restoration of the Private Right of Action for Aiding and Abetting Liability under the Federal Securities Laws’ (2010) 73 Alb. L. Rev 603,627, 635, 636 and 637; Stolowy H, ‘Information, trust and the limits of “intelligent accountability” in investment decision making: Insights from the Madoff case’ (2011) HEC Research Papers Series 956, 974 HEC Paris. See US Securities and Exchange Commission, Office of Investigations: Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme – Public Version – (Report No. OIG-509, August 31, 2009) 36 and 425.

86 Rule 10b-5, Securities and Exchange Act of 1934.

87 Melissa C. Nunziato, ‘Aiding and Abetting, a Madoff Family Affair: Why Secondary Actors Should Be Held Accountable for Securities Fraud through the Restoration of the Private Right of Action for Aiding and Abetting Liability under the Federal Securities Laws’ (2010) 73 Alb. L. Rev 603, 615 and 616.

88 See Mason Richard C, ‘Civil Liability for Aiding and Abetting’ (2006) 61(3) Business Lawyer 1135 < [http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale) [b73f-](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale) [f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=edsgcl.152994](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale) [492&db=congale](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale)> Date accessed 29/04/2019.

89 See Richard C Mason, ‘Civil Liability for Aiding and Abetting’ (2006) 61(3) Business Lawyer 1135 < [http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale) [b73f-](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale) [f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=edsgcl.152994](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale) [492&db=congale](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale)> Date accessed 29/04/2019.

carrying out an unlawful act.90 It follows, that although it could be disputed that these alleged sophisticated investors had contributed in creating a larger aftermath of losses in the Ponzi-scheme, there were no actions or public misstatements made by these sophisticated investors which was relied upon by innocent investors to invest money in Madoff.91 This shows an enforcement gap as the conduct of these sophisticated investors (Secondary Violator) of investing large quantities of money to the scheme is just as dangerous and equally as damaging as the conduct of Madoff (Primary Violator) operating the Ponzi-scheme.92 Thus, like Nunziato’s view on other alleged secondary violators such as Madoff’s family members, these sophisticated investors are

90 Ibid. See *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A* (1994) 511

U.S. 164, 191 and *Stoneridge Investment Partners v. Scientific-Atlanta* (2008) 552 U.S. 148 in contrast *Brennan v. Midwestern United Life Ins.* Co. 259 F. Supp. 673 (N.D. Ind. 1966). See Mason Richard C, ‘Civil Liability for Aiding and Abetting’ (2006) 61(3) Business Lawyer 1135

< [http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale) [f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=edsgcl.152994](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale) [492&db=congale](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale)> Date accessed 29/04/2019.

91 Melissa C. Nunziato, ‘Aiding and Abetting, a Madoff Family Affair: Why Secondary Actors Should Be Held Accountable for Securities Fraud through the Restoration of the Private Right of Action for Aiding and Abetting Liability under the Federal Securities Laws’ (2010) 73 Alb.

L. Rev 603, 632 and Wilkes CJ, 'Secondary-Actor Liability in a Post-Stoneridge World: Yes, a Successful Suit against Secondary Actors is Still Possible.' (2010) 40(4) Seton Hall L Rev 1811, 1819.

92 Phrase derived from, *Brennan v. Midwestern United Life Ins.* Co. 259 F. Supp. 673, 680 (N.D.

Ind. 1966) and Melissa C. Nunziato, ‘Aiding and Abetting, a Madoff Family Affair: Why Secondary Actors Should Be Held Accountable for Securities Fraud through the Restoration of the Private Right of Action for Aiding and Abetting Liability under the Federal Securities Laws’ (2010) 73 Alb. L. Rev 603, 621. See example of an aider lending money and knowing that it would assist in the fraudulent scheme in Mason Richard C, ‘Civil Liability for Aiding and Abetting’ (2006) 61(3) Business Lawyer 1135 < [http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale) [f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=edsgcl.152994](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale) [492&db=congale](http://eds.b.ebscohost.com/eds/detail/detail?vid=11&sid=894adc46-ae27-4af5-b73f-f10c0bad29c0%40sessionmgr120&bdata=JnNpdGU9ZWRzLWxpdmU%3d%23AN%3Dedsgcl.152994492&db=congale)> Date accessed 29/04/2019 analogy on affirmative assistance in *Aetna Casualty, Surety v. Leahey Constr. Co*. 219 F.3d 519, 537 (6th Cir. 2000)

immune from the private civil liability unless they meet the requirements of a primary violation. Therefore, being recognised as a primary violator.93

## Conclusion

Every instrument that breathes universalism is attacked for its ignorance of not considering distinctive norms which falls outside its foundational contours of what is perceived to be the right answer in the given situation. The Fraud Triangle Theory is one of them as it could not explain why Madoff had committed the fraud. This is because, there was no pressure nor rationalisation present. Where opportunity is conceived as the nefarious capability of a single individual committing the fraud, the Fraud Triangle Theory fails to appreciate that auditors and alleged sophisticated investors can also aid and abet the fraudster in further expanding his/her influence. To prosecute these aiders and abetters, this essay argued that private litigants are the only people that can bring justice and integrity back to the Financial Market after the SEC shamelessly exposed its flaws of handling Madoff’s scandal. Until, the restriction of securities fraud is not loosened to prosecute these secondary violators, this enforcement gap will act as a safe haven for these fraudsters.

93 Melissa C. Nunziato, ‘Aiding and Abetting, a Madoff Family Affair: Why Secondary Actors Should Be Held Accountable for Securities Fraud through the Restoration of the Private Right of Action for Aiding and Abetting Liability under the Federal Securities Laws’ (2010) 73 Alb. L. Rev 603, 632.

#### Theorising Fraud Within SeaWorld: Why are the Killer Whales Deprived of the Treatment they Deserve?

*Bhavisha Parmar*

#### Introduction

SeaWorld is an entertainment company and marine-zoological park with three parks around the U.S.1 This essay will focus on the dolphins at the park, including the killer whales known as ‘orcas.’2 SeaWorld currently has 20 orcas in its three parks, however, at least 166 have died in captivity.3 There have been cases where SeaWorld can be deemed guilty of conducting fraudulent acts. Their parks have knowingly deceived the public and attempted to cover up errors in their mannerisms. The company is also guilty of attempting to deceive stakeholders with incorrect figures.4 It is clear that SeaWorld participates in fraudulent activities to protect their public reputation. However, their efforts to conceal and deceive came into light in the 2013 documentary ‘Blackfish’ which revealed the truths behind the awful living conditions of the animals they hold in captivity.5 In this essay, fraud theories, such as the Fraud Pentagon Model and Galatea Effect, will be used to help explain why an enabling environment for fraudulent activities has arisen at SeaWorld. I will draw comparisons of the situation to that of Factory Farming, as both the latter and SeaWorld can be deemed as partaking in fraudulent behaviour in terms of animal exploitation. Finally, I will critically

1 No Author, ‘SeaWorld Parks and Entertainment’ (*Seaworld,* 2019) <<https://seaworld.com/>> accessed 4 February 2019: SeaWorld has three parks in Orlando, San Antonio and San Diego.

2 BoldLight, ‘Our 4 Goals to End Captivity’ (*Whale and Dolphin Conservation,* 2019)

<<https://us.whales.org/our-4-goals/end-captivity/orca-captivity/>> accessed 5 March 2019: Orcas (despite being known as ‘killer whales’) form part of the dolphin family as opposed to being whales, due to their high intelligence and group-orientated hunting tendencies.

3 ibid.

4 Jade Scipioni, ‘SeaWorld and Former CEO Fined £5 million for ‘Blackfish’ Fallout’ (*Fx Business,* 18 September 2018) <[https://www.foxbusiness.com/features/seaworld-and-](https://www.foxbusiness.com/features/seaworld-and-former-ceo-fined-5-million-for-blackfish-fallout) [former-ceo-fined-5-million-for-blackfish-fallout](https://www.foxbusiness.com/features/seaworld-and-former-ceo-fined-5-million-for-blackfish-fallout)> accessed 7 April 2019.

5 No Author, ‘Blackfish About’ (*Blackfish Movie,* 2013)

<<http://www.blackfishmovie.com/film>> accessed 29 March 2019.

discuss the way in which fraud can be deterred, detected and prevented at SeaWorld. This will include introducing legislation specific to animals in captivity and also an internal whistleblowing process embedded within SeaWorld’s ethical code.

## Reflecting on the Concepts and Definitions of Fraud at SeaWorld and Discussing the Factors and Circumstances That Give Rise to Fraud in this Context

#### The Irony of the ‘SeaWorld Cares’ Campaign and Relating the Fraudulent Behaviour to Federal US law

SeaWorld enjoys exercising the reputation that they massively care for their

animals, and that the welfare of their animals is at the core of their business model.6 To maintain this reputation, they launched an initiative named ‘SeaWorld Cares.’7 This was to preserve the ‘respect and approval from members of society.’8 SeaWorld states that this programme is a key example of their ‘world-class standard of care’ for their animals. However, the concept of fraud is evident when they breach this ideal by painting the animals with tar, to hide the sunburn they are subjected to from spending hours in a tank under direct sunlight.9 This method, which includes chemicals such as zinc oxide,10 to cover burns and blistering skin has been proven to give animals cancer.11 A study by Lu-Fu-Hua showed that in animals which had been subjected to prolonged painting with tobacco tar, the appearance of cancer was hastened.12 This is a harmful way of hiding the animal’s wounds13 and is done because using tar is a quicker and cheaper method than allowing the

6 No Author, ‘Animal Rescue’ (*Seaworld,* 2019)

<<https://seaworldentertainment.com/commitment/animal-rescue-rehabilitation/>> accessed 27 February 2019.

7 ibid.

8 Joel Meyer, ‘Reflections on Some Theories of Punishment’ (1969) 59 Journal of Criminal Law and Criminology 595, 598.

9 Marion Kutter, ‘Seaworld Paints Orcas Black’ *(Dive)* <[http://divemagazine.co.uk/life/6700-](http://divemagazine.co.uk/life/6700-seaworld-painting-orcas-black)

[seaworld-painting-orcas-black](http://divemagazine.co.uk/life/6700-seaworld-painting-orcas-black)> accessed 4 March 2019.

10 ibid.

11 Kanematsu Gugiura, ‘Observations on Animals Painted with Tobacco Tar’ Huntington Fund for Cancer Research 41, 42.

12 ibid.

13 ibid.

animals’ skin to heal naturally. If they allowed the animals time to heal before performing in entertainment shows, this could take a considerable amount of time. Solving the issue using tar is a short-term, harmful solution that SeaWorld choose to exploit, and by doing this I argue that they are breaching their duty to protect and care for animals. This could appear as fraudulent misrepresentation as they are displaying an image to the public and misleading them purposely.14

Fraudulent misrepresentation is a civil offence regulated under 33 U.S. Code

931.15 Under this Code, any claimant who knowingly and wilfully makes a false statement for the purpose of obtaining a benefit shall be guilty.16 The company are leading the public to believe that by paying entrance to the parks they are contributing to ‘SeaWorld Cares.’ However, SeaWorld misleads the public in this way and seem to receive no subsequent repercussions from regulating authorities.

#### Applying Fraud Theories to SeaWorld – The Fraud Pentagon Model

It could be argued that SeaWorld is an institute with low personal ethics. Abayomi’s study shows that individuals with low personal ethics will not see anything wrong in committing fraud.17 This statistic is relevant to the fraudulent activities occurring at SeaWorld, as they clearly do not see anything wrong with holding these animal’s captive

14 Alex Berezow, 'Fraud: Farmers Caught Selling Conventional Crops As Organic' (*American Council on Science and Health*, 12 October 2018)

<[https://www.acsh.org/news/2018/10/12/fraud-farmers-caught-selling-conventional-crops-](https://www.acsh.org/news/2018/10/12/fraud-farmers-caught-selling-conventional-crops-organic-13506) [organic-13506](https://www.acsh.org/news/2018/10/12/fraud-farmers-caught-selling-conventional-crops-organic-13506)> accessed 1 March 2019.

15 No Author, ‘What is Fraudulent Misrepresentation?’ (*Legal Resource Centre)*

<<https://www.minclaw.com/legal-resource-center/what-is-fraudulent-misrepresentation/>> accessed 1 March 2019; No Author, ’33 U.S. Code 931: Penalty for Misrepresentation’ (*Legal Information Institute)* <<https://www.law.cornell.edu/uscode/text/33/931>> accessed 8 April 2019.

16 ibid.

17 Olukayode Sorunke, ‘Personal Ethics and Fraudster Motivation: The Missing Linked in Fraud Triangle and Fraud Diamond Theories’ (2016) 6 International Institute for Forensic Accounting Research and Development 159.

in unnatural environments. This can be further demonstrated by the fact that trainers are instructed to mislead guests who visit the park, claiming that ‘orcas do better in concrete tanks’ than in the ocean.’18 In fact, a ‘whistle-blow’ account from a previous trainer recalled being restricted from using certain terms such as ‘natural habitat’ when talking to guests.19 These are just a few instances of how SeaWorld have tried to cover-up the dark truth about the animals it holds in captivity. Therefore, when attempting to understand the concept of fraud, it could be submitted that the personal ethics of an individual and organisation are key contributing factors.20 The ‘Fraud Pentagon Model’21 (FPM) is a theory that captures this important variable. This theory expands upon the scope of the ‘Fraud Triangle Theory’ (FTT) and the ‘Fraud Diamond Theory’ (FDT); it is considered an extension of previous models and consists of the five elements as shown below:

**Diagram 1: The Fraud Pentagon Model22**

### The theory can be applied in this context to explain the concept of fraud in the organisation. All five components must be evident for the theory to apply, and in the case of SeaWorld, I believe they are all

18 Guest Blogger, ‘SeaWorld is All Wet’ (*PETA Prime,* 5 March 2019)

<<https://prime.peta.org/2019/03/seaworld-is-all-wet>> accessed 19 March 2019.

19 ibid.

20 Olukayode Sorunke, ‘Personal Ethics and Fraudster Motivation: The Missing Linked in Fraud Triangle and Fraud Diamond Theories’ (2016) 6 International Institute for Forensic Accounting Research and Development 159.

21 ibid.

22 ibid: All five elements must be satisfied in order to understand the reasons for why fraud is committed.

### sufficiently satisfied. However, I believe that the most important addition is ‘personal ethics.’ Though this is not a stand-alone explanation of why fraud exists in this environment, it can be considered a contributing factor and helps to bridge the gap in the existing models by introducing this idea of ‘personal ethics.’23

#### Using the Galatea Effect to Explain the Blind Compliance of Employees

The Galatea Effect (GE) is another credible theory which can explain the concept of fraud at SeaWorld. This theory can provide possible explanations as to why employees (e.g. trainers and park staff) contribute to the fraudulent activity. GE states that employees see themselves as determined by their environment and having their choices made for them. This is particularly relevant due to the concept previous discussed where SeaWorld prepped employees to answer customer questions with misleading answers.24 SeaWorld also has calves (infant orcas) snatched away from their mothers whilst still dependent on them – therefore breaking the very bond that the company pretends to research.25 Marine biologists and trainers who work at the park are aware of this immoral treatment26 as they know and care for the animals every day. Nevertheless, this does not stop this unethical practice from continuing. According to GE, this is due to SeaWorld making these choices on behalf of the trainers, and employees hence feel less individually responsible and lack autonomy.27 Therefore, they think they can

23 ibid.

24 Guest Blogger, ‘SeaWorld is All Wet’ (*PETA Prime,* 5 March 2019)

<<https://prime.peta.org/2019/03/seaworld-is-all-wet>> accessed 19 March 2019.

25 Ameena Schelling, ‘SeaWorld Gets Super Defensive Over ‘Depressed’ Mother Orca Footage’ (*The Dodo,* 23 October 2015) <[https://www.thedodo.com/seaworld-responds-depressed-](https://www.thedodo.com/seaworld-responds-depressed-mother-orca-1419016002.html) [mother-orca-1419016002.html](https://www.thedodo.com/seaworld-responds-depressed-mother-orca-1419016002.html)> accessed 19 March 2019.

26 No Author, ’17 Orcas Separated From Their Families, Thanks to SeaWorld’ (*PETA Latino,* 2016) <[https://www.petalatino.com/en/blog/orcas-who-cant-celebrate-mothers-day-thanks-](https://www.petalatino.com/en/blog/orcas-who-cant-celebrate-mothers-day-thanks-to-seaworld/) [to-seaworld/](https://www.petalatino.com/en/blog/orcas-who-cant-celebrate-mothers-day-thanks-to-seaworld/)> 29 March 2019: there has been 17 cases where calves have been torn away from their mothers at SeaWorld.

27 Muel Kaptein, ‘Why Do Good People Sometimes Do Bad Things? 52 Reflections on Ethics at

Work' [2012] Rotterdam School of Management 25; Max Nisen and Aimee Growth, ’27

‘bend the rules’ as they are not fully in charge of the situation.28 This lack of decision-making by the employee leads them into blaming others if they are ‘caught in the act’.29 This could provide an explanation as to why it took several years for whistle-blowers to come forward and fully disclose events behind closed doors at SeaWorld. SeaWorld opened its doors in 1964,30 but the fraudulent acts’ and treatment of animals only came to light in the public eye in 2013 because of ‘Blackfish.’31 McNatt argues that GE has great potential benefits for organisations32 and this is true in the case of SeaWorld, as it allows them to maintain this idea of the organisation being an ‘animal- friendly conservation park.’33 However, McNatt also states that researchers need to continue to learn how, and how much, management might ‘harness their power.’34 This is applicable to SeaWorld as they are purposely committing fraudulent acts by attempting to deceive the public, so GE can be used as a contributing factor as to why fraud has arisen within the context.

#### SeaWorld’s Attempt at Rescuing Their Reputation Using Immoral Means

A possible explanation for the deliberate acts of distortion (including

Psychological Reasons Why Good People Do Bad Things’ (Business Insider, 2012)

<[https://www.businessinsider.com/27-psychological-reasons-why-good-people-do-bad-](https://www.businessinsider.com/27-psychological-reasons-why-good-people-do-bad-things-2012-8?r=US&IR=T) [things-2012-8?r=US&IR=T](https://www.businessinsider.com/27-psychological-reasons-why-good-people-do-bad-things-2012-8?r=US&IR=T)> accessed 19 March 2019.

28 ibid.

29 Muel Kaptein, ‘Why Do Good People Sometimes Do Bad Things? 52 Reflections on Ethics at Work' [2012] Rotterdam School of Management 25.

30 No Author, ‘SeaWorld Parks and Entertainment’ (*Seaworld,* 2019) <<https://seaworld.com/>>

accessed 4 February 2019

31 No Author, ‘Blackfish About’ (*Blackfish Movie,* 2013)

<<http://www.blackfishmovie.com/film>> accessed 29 March 2019.

32 Brian McNatt and Timothy Judge, ‘Boundary Conditions of the Galatea Effect: A Field Experiment and Constructive Replication’ (2004) 47 The Academy of Management Journal 550.

33 No Author, ‘Conservation Efforts’ (*Seaworld Parks and Entertainment,* 2019)

<<https://seaworldentertainment.com/commitment/conservation/>> accessed 29 March 2019.

34 Brian McNatt and Timothy Judge, ‘Boundary Conditions of the Galatea Effect: A Field Experiment and Constructive Replication’ (2004) 47 The Academy of Management Journal 550.

painting the animals with tar) could be explained as SeaWorld’s attempt at protecting the reputation of the park. Stakeholders can be influenced by corporate image and reputation.35 Leading the public and stakeholders to believe that the animals they are visiting are living fulfilled lives would lead to ‘a greater societal reputation,’36 something SeaWorld would find important to uphold. As both Brammar and Pavelin argued, ‘a strong record of environmental performance may enhance… reputation depending on whether the firm’s activities ‘fit’ with environmental concerns in the eyes of stakeholders.’37 Therefore, it is in SeaWorld’s interest to demonstrate ‘sensitivity to any industry-specific issues.’38 However, SeaWorld have not done this in an ethical manner and have used short-term, damaging solutions39 to maintain the stakeholders ‘general expectation’40 of the company. By doing this, they believed that they would uphold their reputation as the animals would come across physically fit and healthy. This would lead to the continuation of visitors and in turn even more visitors. Therefore, it allows the business to grow further and make greater profits, hence keeping faith restored in the company’s stakeholders.

#### Applying the ‘Foot-In-The-Door’ Technique (FITDT) to Explain the Factors Which Give Rise to Fraud

It seems highly unethical to paint any animals body in tar. This brings about the question of how the trainers at SeaWorld who have close

35 Migle Matuleviciene, Jurgita Stravinskiene, ‘The Importance of Stakeholders for Corporate Reputation’ (2015) 26 Kaunas University of Technology 75.

36 ibid.

37 Stephen J. Brammer and Stephen Pavelin, ‘Corporate Reputation and Social Performance: The Importance of Fit’ (2006) 117 Journal of Management Studies 436.

38 ibid.

39 Kanematsu Sugira, ‘Observations on Animals Painted with Tobacco Tar’ Huntington Fund for Cancer Research 41

<<http://cancerres.aacrjournals.org/content/amjcancer/38/1/41.full.pdf>> accessed 19 March 2019.

40 Stephen J. Brammer and Stephen Pavelin, ‘Corporate Reputation and Social Performance: The Importance of Fit’ (2006) 117 Journal of Management Studies 436.

relationships with these animals carry out this practice. We can look towards organisational theories to aid us in understanding the factors which give rise to fraud internally within SeaWorld. The FITDT41 can be used as a factor to explain how SeaWorld trainers adhere to unethical procedures. This compliance technique is known as a strategy used to persuade people to agree to a particular action.42 According to the technique, when an authority figure asks an employee to ‘skirt the rules,’ that employee may go along with the request to be seen as a ‘team player.’ In turn, this modifies their self-perception 43 and prevents them from whistle-blowing. This is because, according to the theory, the trainers at SeaWorld after agreeing to these immoral tasks begin to see themselves as ‘extremely loyal’ to the organisation. SeaWorld trainers may comply with an initial request because it is easier than refusing it and risking confrontation.44 However, studies conducted testing the effectiveness of the FITDT have brought about mixed results.45 Although some studies do support the technique,46 other studies have found that the technique has no statistically significant effect.47 Despite this, De Jong argues that the technique ‘can be reliably obtained’ as he believes there

41 Muel Kaptein, ‘Why Do Good People Sometimes Do Bad Things? 52 Reflections on Ethics at Work' [2012] Rotterdam School of Management 25; Max Nisen and Aimee Growth, ’27 Psychological Reasons Why Good People Do Bad Things’ (*Business Insider,* 2012)

<[https://www.businessinsider.com/27-psychological-reasons-why-good-people-do-bad-](https://www.businessinsider.com/27-psychological-reasons-why-good-people-do-bad-things-2012-8?r=US&IR=T) [things-2012-8?r=US&IR=T](https://www.businessinsider.com/27-psychological-reasons-why-good-people-do-bad-things-2012-8?r=US&IR=T)> accessed 19 March 2019.

42 No Author, ‘Foot-in-the-Door as a Persuasive Technique’ (*Psychologist World,* 2019)

<[https://www.psychologistworld.com/behavior/compliance/strategies/foot-in-door-](https://www.psychologistworld.com/behavior/compliance/strategies/foot-in-door-technique) [technique](https://www.psychologistworld.com/behavior/compliance/strategies/foot-in-door-technique)> accessed 4 April 2019.

43 M P Olson and Fazio, ‘Self-perception and Attitude-Behaviour Consistency’ (1981) 7 Personality and Social Psychology Bulletin 252.

44 No Author, ‘Foot-in-the-Door as a Persuasive Technique’ (*Psychologist World,* 2019)

<[https://www.psychologistworld.com/behavior/compliance/strategies/foot-in-door-](https://www.psychologistworld.com/behavior/compliance/strategies/foot-in-door-technique) [technique](https://www.psychologistworld.com/behavior/compliance/strategies/foot-in-door-technique)> accessed 4 April 2019.

45 Bell, ‘The Foot-in-the-Door Technique’ (*Psychology and Society)*

<<http://www.psychologyandsociety.com/footinthedoor.html>> accessed 4 April 2019.

46 Schwarzwald, Bizman and Raz, 'The foot-in-the-door paradigm: Effects of second request size on donation probability and donor generosity' (1983) 9 Personality and Social Psychology Bulletin 443; No Author, ‘The Foot-in-the-Door Technique’ (*Psychology and Society)* <<http://www.psychologyandsociety.com/footinthedoor.html>> accessed 4 April 2019.

47 Bell, ‘The Foot-in-the-Door Technique’ (*Psychology and Society)*

<<http://www.psychologyandsociety.com/footinthedoor.html>> accessed 4 April 2019; No Author, ‘The Foot-in-the-Door Technique’ (*Psychology and Society)*

<<http://www.psychologyandsociety.com/footinthedoor.html>> accessed 4 April 2019.

are plausible explanations for the studies that showed the technique was ineffective.48 Therefore, we should be mindful of this when using the technique as an explanation of the factors which give rise to fraudulent behaviour at SeaWorld.

#### Drawing Similarities Between Factory Farming and the Fraudulent Activity at SeaWorld

We can draw similarities from this ‘perfect perception’ that SeaWorld strives to maintain for reputational purposes to that of ‘Factory Farming.’ In this instance, consumers are deceived into thinking that the meat they purchase is from animals who have been humanely treated.49 One way in which the industry often misleads consumers is by using terms such as ‘free-range,’ ‘cage-free’ and ‘humane-certified.’50 When buying products from the supermarket with the aforementioned labels, it is likely that consumers are being deceived about the welfare of animals raised for the produce.51 This approach is similar to that of SeaWorld’s advertising campaigns and posters around the park, which promote that the animals under their care are physically and mentally fit. However, the public is starting to become more aware of the deception and the fraudulent claims made by both SeaWorld and also the farming industry.

#### The Current Permit System in the US: The Lack of Monitoring of the Animals at Authority and Government Level

48 William DeJong, ‘An Examination of Self-Perception Mediation of the Foot-in-the-Door Effect’ (1979) 37 Journal of Personality and Social Psychology 221.

49 David Kesmodel, ‘Free-Range? Cage-Free? Organic?’ (*The Wall Street Journal,* 11 March

2015) <[https://www.wsj.com/articles/free-range-cage-free-a-consumers-guide-to-egg-](https://www.wsj.com/articles/free-range-cage-free-a-consumers-guide-to-egg-terminology-1426100409)

[terminology-1426100409](https://www.wsj.com/articles/free-range-cage-free-a-consumers-guide-to-egg-terminology-1426100409)> accessed 5 April 2019.

50 Ibid.

51 No Author, ‘Animals Used for Free-Range and Organic Meat’ (*PETA,* 2019)

<<https://www.peta.org/issues/animals-used-for-food/organic-free-range-meat/>> accessed 7

April 2019.

Despite the clear disruption to pods, capturing these animals can still be conducted in a legal fashion. In 1973, SeaWorld was granted permits which allowed them to capture four killer whales.52 It was argued that the permits were intended for research and education.53 However, SeaWorld was aware that the orcas were going to be used in a similar fashion to circus animals,54 but neglected to mention this use when applying for a permit to obtain them. There appears to be no monitoring of permit use after it has been awarded, because SeaWorld were able to use the whales for entertainment purposes even though this was not stated in the permit application. This lack of monitoring and supervision of permit use created an enabling environment55 for fraud to arise in. Therefore, this allows for fraudulent activities to occur when dealing with the safe-keeping of animals.

## The Manner in Which Policy Makers, Law Makers and Organisations Can Detect, Deter and Prevent Fraudulent Behaviour

#### Holding SeaWorld Accountable For their Permit Use

In order to stop permits being so easily obtained, regulating authorities should hold companies accountable if they use permits outside of the scope for which they were granted. The Sea Conversation Society argues that the

52 Sandra Pollard, *Puget Sound Whales for Sale: The Fight to End Orca Hunting* (2014, The History Press).

53 ibid: He also claimed in the application permit that the whales were a ‘necessity for success in the field of marine biology… and ecology.’

54 No Author, ‘SeaWorld Must End Captivity, Not Just Circus-Style Shows’ (*SeaWorld of Hurt,* 9

November 2015) <[https://www.seaworldofhurt.com/seaworld-must-end-captivity-not-just-](https://www.seaworldofhurt.com/seaworld-must-end-captivity-not-just-circus-style-shows/)

[circus-style-shows/](https://www.seaworldofhurt.com/seaworld-must-end-captivity-not-just-circus-style-shows/)> accessed 5 April 2019.

55 No Author, ‘Fraud Prevention and Detection in a Manufacturing Environment Introduction’ (*Protiviti,* 2019*)*<[https://www.protiviti.com/UK-en/insights/fraud-prevention-and-detection-](https://www.protiviti.com/UK-en/insights/fraud-prevention-and-detection-manufacturing-environment-introduction) [manufacturing-environment-introduction](https://www.protiviti.com/UK-en/insights/fraud-prevention-and-detection-manufacturing-environment-introduction)> accessed 6 April 2019.

public must keep the pressure on and ask federal agencies to stop allowing permits for the capture and transportation of these aquatic animals.56 As Sorunke argued, prevention is better than any cure that could be offered.57 Therefore, I believe that a professional body in the US should exist with supervisory capacity that requires SeaWorld to provide updates of the animals once the permit has been issued. Organisations that campaign for the rights of animals such as PETA could be involved in helping to implement this. I believe this would be an effective way of minimising fraud in terms of permit use and also to hold organisations accountable for their actions.

#### Using Financial Punishments and Third-Party Auditors as Fraud Deterrents

SeaWorld’s former CEO was caught ‘downplaying’ to investors the damage caused by the Blackfish documentary.58 Due to breaching antifraud provisions,59 SeaWorld received a $5 million penalty. However, considering in 2013, Public Offering valued SeaWorld at $2.5 billion,60 and in 2012 earned

$77.4 million,61 $5 million does not even ‘scratch the surface’ of their large profit margins. It appears that the small magnitude of this penalty is not enough to hold SeaWorld accountable for their mistakes and that they should have been fined a higher amount. As Wells stated ‘corporate insiders have a

56 ibid.

57 Olukayode Sorunke, ‘Personal Ethics and Fraudster Motivation: The Missing Linked in Fraud Triangle and Fraud Diamond Theories’ (2016) 6 International Institute for Forensic Accounting Research and Development 159.

58 Jade Scipioni, ‘SeaWorld and Former CEO Fined £5 million for ‘Blackfish’ Fallout’ (*Fx*

*Business,* 18 September 2018) <[https://www.foxbusiness.com/features/seaworld-and-](https://www.foxbusiness.com/features/seaworld-and-former-ceo-fined-5-million-for-blackfish-fallout) [former-ceo-fined-5-million-for-blackfish-fallout](https://www.foxbusiness.com/features/seaworld-and-former-ceo-fined-5-million-for-blackfish-fallout)> accessed 7 April 2019: it was reported that from approximately December 2013 through August 2014, SeaWorld made untrue and misleading statements or omissions in SEC filings, earnings releases and calls.

59 Mihir Zaveri, ‘SeaWorld Agrees to Pay $5 Million in ‘Blackfish Effect’ Case (*NY Times,* 19

September 2018) <[https://www.nytimes.com/2018/09/19/business/seaworld-blackfish-](https://www.nytimes.com/2018/09/19/business/seaworld-blackfish-fine.html) [fine.html](https://www.nytimes.com/2018/09/19/business/seaworld-blackfish-fine.html) > accessed 7 April 2019: The law requires publicly traded companies to inform investors of circumstances that could materially affect their business.

60 William Alden, ‘Public Offering Values SeaWorld at $2.5 Billion’ (*Deal Book, NY Times,* 18

April 2013) <[https://dealbook.nytimes.com/2013/04/18/seaworld-prices-i-p-o-at-top-of-](https://dealbook.nytimes.com/2013/04/18/seaworld-prices-i-p-o-at-top-of-range/)

[range/](https://dealbook.nytimes.com/2013/04/18/seaworld-prices-i-p-o-at-top-of-range/)> accessed 8 April 2019.

61 ibid.

fiduciary duty to act in the best interests of the shareholders… (and) a part of this duty should include financial transparency.’62 As SeaWorld clearly breached this duty, I submit that a more effective punishment and deterrence of deception to stakeholders would be to allow independent third-party auditors to be ‘given access to any financial information that bears on this issue.’63 The benefit of this approach is that it would make it more difficult for insiders such as the CEO ‘to conceal ill-gotten gain.’64 The financial transparency required of this approach could also be a ‘significant and powerful deterrent.’65

#### Implementing Whistleblowing Procedures at SeaWorld to Deter and Detect Fraud

Another suggestion to combat incorrect permit use and untruthful statements being released to stakeholders could be to have an internal policy regarding whistleblowing implemented at SeaWorld for employees. An internal whistleblower ‘can observe the various violations that occur within an organisation’66 and to encourage them to speak out it should be made clear that they are protected from any form of retaliation or appraisal.67 As Lee submitted the #MeToo Movement showed how ‘we all have to act and participate to achieve the shift and change.’68 I believe that an internal code-

62 Joseph Wells, ‘New Approaches to Fraud Deterrence’ (*Journal of Accountancy, 1 February 2004)*

<[https://www.journalofaccountancy.com/issues/2004/feb/newapproachestofrauddeterrenc](https://www.journalofaccountancy.com/issues/2004/feb/newapproachestofrauddeterrence.html) [e.html](https://www.journalofaccountancy.com/issues/2004/feb/newapproachestofrauddeterrence.html)> accessed 7 April 2019.

63 ibid.

64 ibid.

65 ibid.

66 Jeannette Taylor, ‘Internal Whistle‐Blowing in the Public Service: A Matter of Trust’ [2018] Public Administration Review.

67 Carl Stanford, ‘Encouraging Whistleblowing in the Workplace’ (*Fleximize)*

<<https://fleximize.com/articles/000587/whistleblowing-in-the-workplace>> accessed 8 April 2019: A corporate culture that supports employees in voicing their concerns without fear of reprisal is less likely to suffer from external whistleblowing. As a result, if reported from an existing employee internally, SeaWorld will be in a better position to manage and contain the situation before it can be exploited and used by external sources such as the media.

68 Bun-Hee Lee, ‘#MeToo Movement; It is Time That We All Act and Participate in Transformation’ (2018) 15 Psychiatry Investigation 433.

of-conduct regarding whistleblowing protocols69 at SeaWorld would help the company to avoid internal affairs being publicised, and therefore help to protect their reputation.

#### Implementing Laws for the Protection of Animals in Captivity

Finally, I argue that there should be legislation and a specific Act in the U.S. that is centred around the treatment of animals in captivity. This ‘Animals in Captivity Act’ could help counteract the enabling environment which has allowed fraud to arise by protecting the rights and conditions of these animals. It could specifically target failures in the current system and focus on ensuring that the current animals in captivity have actual legal rights that organisations are accountable for upholding. This is a form of ‘social- change’70 and law and legislation are commonly seen as a way of encouraging people to ‘do the right thing.’71

However, we should be mindful of the fact that the suggestions made above to detect and deter fraud within this context are not a complete solution.72 Even if they were all implemented within SeaWorld, we would still have to recognise there is no one-mechanism that could solve the fraudulent activity at the park and prevent all the individual issues that give rise to fraud.

69 Jeannette Taylor, ‘Internal Whistle‐Blowing in the Public Service: A Matter of Trust’ [2018] Public Administration Review.

70 Kishan Tiwari, ‘Article: Importance of Law in Society’ (*Legal Desire*, 8 November 2018)

<<https://legaldesire.com/article-importance-of-law-in-society/>> accessed 5 April 2019.

71 No Author, ‘The Importance of the Law’ (*Pearson,* 2015)

<[http://wps.pearsoned.co.uk/ema\_uk\_he\_mcbride\_letters\_3/248/63704/16308274.cw/cont](http://wps.pearsoned.co.uk/ema_uk_he_mcbride_letters_3/248/63704/16308274.cw/content/index.html) [ent/index.html](http://wps.pearsoned.co.uk/ema_uk_he_mcbride_letters_3/248/63704/16308274.cw/content/index.html)> accessed 7 April 2019.

72 Joseph Wells, ‘New Approaches to Fraud Deterrence’ (*Journal of Accountancy*, 1 February

2004)

<[https://www.journalofaccountancy.com/issues/2004/feb/newapproachestofrauddeterrenc](https://www.journalofaccountancy.com/issues/2004/feb/newapproachestofrauddeterrence.html) [e.html](https://www.journalofaccountancy.com/issues/2004/feb/newapproachestofrauddeterrence.html)> accessed 7 April 2019.

#### Conclusion

There seems to be an enabling environment at SeaWorld which allows for fraudulent activities to arise. There are varying types of fraud which have been addressed. These include the company attempting to use dishonesty and lies to cover up figures presented to stakeholders73 and to protect their own reputation as a brand. Theories of fraud such as the FITDT, FPM and GE have all been used to critically debate SeaWorld’s actions to help us understand the factors which allow fraud to arise. These multi-disciplinary theories all provide credible explanations as to why fraud exists. However, we should be mindful that these are not stand-alone explanations, as there may be further underlying reasons as to why organisations of this magnitude would commit fraud. The situation at SeaWorld has been compared to that of Factory Farming, where both industries appear to deceive consumers to protect their public reputations and boost sales. Finally, deterrents of fraud incorporating a range of disciplines have been discussed and applied to this context. A whistleblowing culture could be incorporated internally within SeaWorld to help encourage employees to report violations within the company.74 Furthermore, I believe that implementing specific legislation in the U.S. relating to animals in captivity and imposing harsher financial punishments could effective ways of deterring fraud. To conclude, I believe that the animals at SeaWorld deserve to have protected rights and to be treated in more ethical manner. Defining and understanding the reasons behind why fraud arises is important in this context as it allows us to bring about tailored solutions and fraud deterrents to help the animals get the treatment they deserve.

73 Jade Scipioni, ‘SeaWorld and Former CEO Fined £5 million for ‘Blackfish’ Fallout’ (*Fx Business,* 18 September 2018) <[https://www.foxbusiness.com/features/seaworld-and-](https://www.foxbusiness.com/features/seaworld-and-former-ceo-fined-5-million-for-blackfish-fallout) [former-ceo-fined-5-million-for-blackfish-fallout](https://www.foxbusiness.com/features/seaworld-and-former-ceo-fined-5-million-for-blackfish-fallout)> accessed 7 April 2019.

74 Jeannette Taylor, ‘Internal Whistle‐Blowing in the Public Service: A Matter of Trust’ [2018]

Public Administration Review.

# Equity and Trusts

#### Automatic Resulting Trusts: The Unjust Enrichment Approach

*Mollie White*

#### Introduction

The rationale for ‘automatic resulting trusts’1 arising, has sparked much disagreement amongst academics, with the case law being said to ‘offer a choice between very different interpretations’.2 However, it is proposed that unjust enrichment reasoning provides the most appealing approach and offers justice in line with the objectives of the law of equity.3

#### The Operation of the Automatic Resulting Trust

An automatic resulting trust arises where property has been transferred to the defendant to be held on an express trust that fails, either initially or subsequently, that property will be held on resulting trust for the settlor.4 Due to the property being transferred on trust, the resulting trust operates simply to establish that the trustee now holds the property on trust for the settlor.5

#### The Unjust Enrichment Approach

Unjust enrichment6 lawyers take the view that resulting trusts arise in the absence of an intention to make a gift,7 to reverse unjust enrichment.8 For example, where a transfer of property is made from A to B, where A does not

1 *Re Vanderell Trusts (No. 2)* [1974] Ch 269 (CA) [294] (Megarry J).

2 Peter Birks, *Unjust Enrichment* (OUP 2005) 180.

3 Allan Beever, ‘Aristotle on Equity, Law and Justice’ [2004] 10 Legal Theory 33, 33.

4 Graham Virgo, *The Principles of Equity & Trusts* (3rd edn, OUP 2018) 212.

5 *Tinsley v Milligan* [1994] 1 AC 340, 371 (Lord Browne-Wilkinson).

6 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 (HL); Graham Virgo, *The Principles of Equity & Trusts* (3rd edn, OUP 2018) 249.

7 Peter Birks, ‘Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case’ [1996] RLR 3, 16.

8 Robert Chambers, *Resulting* Trusts (OUP, 1997) 209 - 212; Rachel Leow & Timothy Liau,

‘Resulting Trusts: A Victory for Unjust Enrichment’ [2014] CLJ 73, 500 cf *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 1 AC 669 (HL).

intend to benefit B. This is also known as the ‘lack of intention analysis’,9 as it is a response to the claimant’s absence of intention that the defendant should receive the property beneficially, which correlates with the nature of transferee’s role and places relevance on the transferor’s intentions only.10 It follows that when the purpose of an express trust can no longer be fulfilled, any property (enrichment) received must be held on an automatic resulting trust for the claimant who did not intend to benefit the defendant in the circumstances. In turn, converting a personal liability, to restore the value to the claimant into a proprietary claim.11

#### The Wider Implications Mistaken Payments

Unjust enrichment explains resulting trusts and so paves the way for mistaken

payments; mistaken payments are a classic illustration of unjust enrichment, giving rise to proprietary restitution.12 As mistake is recognised as an “unjust factor”, this suggests proprietary restitution is generally available for other unjust factors, except where subsequent failure occurs.13 It has been said that the claimant’s intention is vitiated to ‘differing extents’14 in the case of resulting trusts and mistaken payments, as vitiation is a matter of degree.15 Therefore, if they are treated in the same way, via the wide approach offered by unjust enrichment, it will significantly impact the current state of the law,16

9 Rachel Leow & Timothy Liau, ‘Resulting Trusts: A Victory for Unjust Enrichment?’ 73 CLR 500; *Chan Yuen Lan v See Fong Mun* [2014] SGCA 36.

10 Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) 38-31.

11 Graham Virgo, *The Principles of the Law of Restitution* (OUP, 2015) 585.

12 e.g. *Craddock Brothers v Hunt* [1923] 2 Ch 136 (CA); *Chase Manhattan Bank NA v Israel British Bank (London) Ltd* [1981] Ch 105 (Ch) (Goulding J); *Blacklocks v JB Developments (Goldaming) Ltd* [1982] Ch 183 (Ch); *Woolwich Equitable Building Society v IRC* [1993] AC 70 (HL) [164], [192] cf. *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669; *Fitzalan-Howard (Norfolk) v Hibbert* [2009] EWHC 2855, [2009] 11 WLUK 272 [49] (Tomlinson J); *Pertemps Recruitment Partnership Ltd v HMRC* [2011] UKUT 272 (TCC) [82 – 83] (Arnold J).

13 Andrew Burrows, ‘Proprietary Restitution: Unmasking Unjust Enrichment’ [2001] 117 LQR 412, 423-28; Peter Birks, *Unjust Enrichment* (OUP 2005) 192.

14 Graham Virgo, *The Principles of the Law of Restitution* (OUP, 2015) 174.

15 ibid.

16 Andrew Burrows, *Understanding the Law of Obligations: Essays on Tort, Contract and Restitution (Hart 1998)* 67-68.

resulting in ‘proprietary overkill’.17 However, it is submitted that providing proprietary restitution for mistaken payments, will input simplicity and coherence into the law of restitution whilst taking account of the claimant’s lack of knowledge and accidental nature of the transfer. The logic of this analysis is evidenced by Birks’ position.18 He states that a resulting trust here, is ‘resulting in pattern and effect’,19 as where funds are transferred by mistake, and traceably used towards a purchase, the initial holder of the funds contributed to that purchase. In turn, the interest jumps back to where it came, depriving the mistaken payee of the enrichment.20

#### The Insolvency Hierarchy

It is most significant that claims of proprietary restitution allow a claimant to assert rights over substitute assets, as well as gaining priority in insolvency,21 essentially jumping up the order of priorities. It is questionable that the claimant should be afforded such priority, as it provides them with ‘excessive proprietary protection’22 and has been labelled the weakness of the ‘absence- of-intent theory’.23 The law of unjust enrichment rests on a resulting trust arising whenever the claimant’s intention to benefit the defendant has been vitiated.24 Based upon this wide principle, resulting trusts may arise too frequently, as in most cases the defendant will have been unjustly enriched,25 which is ineffective and undermines the rule of law. However, unjust enrichment lawyers have sought to limit the recognition of the resulting

17 William Swadling, ‘A New Role for Resulting Trusts’ [1996] 16(1) LS 110, 126; David Salmons, ‘The Availability of Proprietary Restitution in the Case of Mistaken Payments’ [2015] CLJ 534, 540.

18 Peter Birks, “Restitution and Resulting Trusts” in S. Goldstein (ed), Equity and Contemporary Legal Developments (1992) 335, 360; Peter Birks ‘Trusts Raised to Reverse Unjust Enrichments: The Westdeutsche Case’ [1996] RLR 3

19 Peter Birks ‘Trusts Raised to Reverse Unjust Enrichments: The Westdeutsche Case’ [1996] RLR 3, 17.

20 ibid.

21 David Salmons, ‘The Availability of Proprietary Restitution in the Case of Mistaken Payments’ [2015] CLJ 534.

22 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) [716] (Lord Browne-Wilkinson).

23 Graham Virgo, ‘The Principles of the Law of Restitution’ (OUP 2015) 585.

24 ibid.

25 ibid.

trusts.26 Therefore, where a total failure of basis occurs, a resulting trust would not be recognised, as the defendant would have been able to use the property freely when it was transferred.27 In turn, this provides a more specific requirement and narrower application.

#### The Current Position at Law

At present, resulting trusts do not give rise to proprietary claims, 28 thus the unjust enrichment approach is not accepted.29 In *Westdeutsche*,30 Lord Browne- Wilkinson, proposed that resulting trusts only arise in the traditional categories of apparent gifts or trusts which fail,31 because parties have a common intention to create a trust.32 These suggestions contradict numerous existing resulting trust cases,33 such as those concerning *Quistclose* trusts.34 Here, money is transferred for a specific purpose,35 the borrower must use it for that purpose,36 and the borrower holds the money under a trust for the lender if the purpose fails.37 In this instance, the secondary trust for the lender

26 Robert Chambers, *Resulting Trusts* (OUP, 1997) 145.

27 Graham Virgo, ‘The Principles of the Law of Restitution’ (OUP 2015) 585; Consistent with

[*Sinclair v. Brougham* [1914] AC 398](https://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=18&crumb-action=replace&docguid=IA8D447C1E42811DA8FC2A0F0355337E9) (HL) cf *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL).

28 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 1 AC 669 (HL) (Lord Goff) [690] [720] cf. [*Sinclair v. Brougham* [1914] AC 398](https://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=18&crumb-action=replace&docguid=IA8D447C1E42811DA8FC2A0F0355337E9) (HL) *(*Viscount Haldane LC) *[420-421].*

29 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 1 AC 669 (HL) [716] cf Peter Birks, ‘Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case’ [1996] RLR 3.

30 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 1 AC 669 (HL) (‘*Westdeutsche’*).

31 ibid [689].

32 ibid [708].

33 Robert Chambers, ‘*Westdeutsche Landesbank Girozentrale v Islington LBC Case Note’*

[1996] 20 Melbourne University Law Review 1192, 1195.

34 First recognised in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL); see also *Hassall v Smithers* (1806) 33 ER 46 (Ch); *Twinsectra v Yardley* [2002] UKHL 12; [2002] 2 AC 164; Swadling (ed.) *The Quistclose Trust: Critical Essays* (Oxford: Hart, 2014); Peter Millet, ‘The Quistclose trust: who can enforce it?’ (1985) 101 LQR 269.

35 *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207 (Ch); *Re EVTR* [1987] 6 WLUK 221 (CA); *Box v Barclays Bank* [1998] 3 WLUK 495 (Ch); *Cobbold v Bakewell Management Ltd* [2003] EWHC 2289 (Ch), [2003] 9 WLUK 85 [16] (Rimer J); *Cooper v Official Receiver* [2002] EWHC 1970 (Ch), [2003] BPIR 55.

36 *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [74] (Lord Millett); *Charity Commission for England and Wales v Framjee* [2014] EWHC (Ch), [2015] 1 WLR 16 [28(b)] (Henderson J) cf. *Bellis v Challinor* [2015] EWCA Civ 59, [2016] 2 WLUK 136.

37 *Re EVTR* [1987] ] 6 WLUK 221 (CA); *Carreras Rothans Ltd v Freeman Mathews Treasure Ltd*

[1985] Ch 207 (Ch) [223] (Gibson J); *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164

[95] [193] (Lord Millett); Peter Birks, ‘Retrieving Tied Money’ in W Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 126; Robert Chambers, *Resulting Trusts* (OUP 1997) 148.

is considered a resulting trust, 38 but note there is no apparent gift and the specific purpose is not a failed express trust.39 Accordingly unjust enrichment lawyers have stated that *Quistclose* trusts are resulting trusts, responding to the failure of consideration, namely failure to use the money for the specified purpose.40 It is advocated that it is too late to retreat to the traditional categories of resulting trusts and there is no sufficient reasoning for doing so.41

In addition, Lord Browne-Wilkinson’s theory,42 does not explain all the instances where resulting trusts arise.43 Plus, the artificial suggestion that resulting trusts arise due to a common intention to create a trust,44 is not a convincing line of reasoning, as there are too many cases where one party is unaware of the arrangement.45 However, the approach that resulting trusts respond to the lack of intention to benefit the recipient can and does explain all resulting trust cases.

#### Opposing Approaches

Swadling submits that automatic resulting trusts simply arise by operation of law, based on the construction of the existing facts, which have already been proven by evidence.46 Essentially, for Swadling these are express trusts without words.47 However, Swadling’s approach appears too ‘legalistic’,48 as it will

38 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) 990.

39 Peter Millet, ‘The Quistclose Trust: Who Can Enforce It?’ [1985] 101 LQR 269, 275-6.

40 Robert Chambers, ‘*Westdeutsche Landesbank Girozentrale v Islington LBC Case Note’* [1996] 20 Melbourne University Law Review 1192, 1195 cf. Peter Birks, *Unjust Enrichment* (OUP 2005) 197.

41 Robert Chambers, ‘*Westdeutsche Landesbank Girozentrale v Islington LBC Case Note’*

[1996] 20 Melbourne University Law Review 1192, 1195.

42 Followed William Swadling, ‘A New Role for Resulting Trusts’ [1996] 16 LS 110.

43 e.g. *Ryall v Ryall* (1739) 26 ER 39 (Ch); *Vandervell v IRC* [1967] 2 AC 291 (HL); *Hodgson v Marks* [1971] Ch 892 (CA).

44 First suggested in *Tinsley v Milligan* [1994] 1 AC 340 (HL) [371].

45 *Ryall v Ryall* (1739) 26 ER 39 (Ch); *Birch v Blagrave* (1755) 27 ER 176 (Ch); *Childers v Childers* (1857) 44 ER 810 (Ch); *Vandervell v IRC* [1967] 2 AC 291 (HL); Nick Piska, ‘Two Recent Reflections on the Resulting Trust’ [2008] CPL 441, 449; e.g. *Re Vinogradoff* [1935] WN 68.

46 William Swadling, ‘Explaining Resulting Trusts’ [2008] LQR 72, 95 cf Robert Chambers,

*Resulting Trusts* (OUP, 1997) 45-46, 51, 66.

47 James Penner, ‘Resulting Trusts and Unjust Enrichment: Three Controversies’ in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart, 2010) 238.

48 Peter Birks, ‘Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case’ [1996] RLR 3, 18.

rarely be found without the aid of a fictional presumption,49 implying some existing legal knowledge is needed to create a resulting trust, which is untrue.50 Additionally, Swadling states that automatic resulting trusts ‘defy legal analysis’,51 suggesting his reasoning is flawed, if he himself cannot draw an adequate conclusion.

Mee labels the automatic resulting trust as a ‘hybrid’,52 arising due to the decision of the trustor, while the beneficial interest is allocated to the trustor due to the rule of Equity, that has been devised to fill any gaps in the beneficial interest under a trust.53 Later, Mee concludes that the foundation of the law’s protection of the third party beneficiary, is based on the trustor’s conduct in entrusting the trustee with the property, and naming the beneficiary as the person for whom the property is held.54 Meaning, as long as someone is intended to be a trustee, Equity will hold them to a trust, even if it is not the one originally envisaged by the settlor. In turn, ignoring that the trust being provided may not be the same as that intended, by the decisions of the trustor. Thus, the foundations upon which Mee’s theory is built appear to be different than those he proposes.

#### A Case Law Example

In light of the unjust enrichment reasoning set out above, the case of *Davis v Hardwick*55 was not correctly decided. Here, the trustees held the funds, for the purpose that they would be utilised for the beneficiary’s specialised, life- saving surgery. This purpose never needed to be fulfilled, as the surgery was funded by the NHS, therefore, allowing the trustees to retain the funds for the

49Peter Birks, ‘Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case’ [1996] RLR 3, 18; Peter Birks, *Unjust Enrichment* (OUP 2005) 174.

50 *Re Schebsman* [1944] Ch 83 (CA) [104] (du Parcq LJ).

51 William Swadling, ‘Explaining Resulting Trusts’ [2008] LQR 72, 102.

52 John Mee, ‘Automatic Resulting Trusts: Retention, Restitution or Reposing Trust?’ [2009] 25, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1962913> <accessed 21 February 2019>.

53 John Mee, ‘Automatic Resulting Trusts: Retention, Restitution or Reposing Trust?’ [2009] 25, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1962913> <accessed 21 February 2019>; Graham Virgo, *The Principles of Equity & Trusts* (3rd edn, OUP 2018) 230.

54 John Mee, ‘The Past, Present and Future of Resulting Trusts’ [2017] 36, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3052141> <accessed 21 February 2019>.

55 [1999] 1 All ER 304 (CA).

beneficiary beyond this purpose, acts as an unjust enrichment. Based on the circumstances, it would be reasonable to assume the NHS would then maintain the beneficiary’s treatment, so the funds should have been held on trust for the contributors as the primary purpose failed. The courts then should not have imputed the uncertain purpose, that the donors would have wanted the funds to help the beneficiary throughout life, based on circumstantial chance that he may have needed future treatment.

It follows that, the confused case law in this area can be clarified by utilising unjust enrichment reasoning. Reconciling the cases in this way allows them two be split into two clear groups: rightly decided56 and wrongly decided,57 which paves the way for future judgements.

#### Conclusion

On balance, unjust enrichment reasoning - namely the lack of intention to benefit the trustees, on behalf of the transferor, as the property had not been free at the trustees’ disposal at any point- provides a simplicity to the law of automatic resulting trusts. It appears unjust enrichment is the best hope for clarity in this disarrayed area of law, as it promotes fairness by providing the donors with a proprietary restitutionary right, to prevent the trustee(s) being unjustly enriched at the expense of the donors.

56 *Re Abbot Fund Trusts, Smith v Abbot* [1900] 2 Ch 326 (Ch); *Re Gillingham Bus Disaster Fund; Bowman and Others v Official Solicitor and Others* [1959] Ch 62 (CA); *Air Jamaica v Charlton* [1999] 1 WLR 1399 (PC); *Re Hoburne Aero Component’s Ltd Air Raid Distress Fund v Forest* [1946] 2 All ER 711 (CA); *Re West Sussex Constabulary’s Widows, Children and Benevolent (1930) Fund Trusts Barnett v Ketteringham and Others* [1971] 1 All ER 544 (Ch).

57 *Davies v Hardwick* [1999] 1 All ER 304 (CA); *Re Andrew’s Trust, Carter v Andrew* [1905] 2 Ch 48 (Ch).

# Jurisprudence

#### The Abstract Examination of Law by Natural Lawyers and Positivists in Relation to General Sociological Issues and LGBTQ Rights

*Naa-Torshie Torto-Tetteh*

#### Introduction

This article will argue that it is truly inadequate for any theory of law, particularly natural law and positivism to examine the law in its abstract. To critically evaluate this, both theories will be explained and analysed. Their connection, or lack thereof, to sociological issues will also be discussed. Moreover, in order to argue the inadequacy of examining the law in its abstract, this article will firstly argue that such theories in doing so, offer a basic defence for inhumane and immoral actions, such as Nazism.12 Secondly, the examining of law in its abstract by natural lawyers and positivists also allow for the legal oppression and discrimination of individuals that do not conform to their theoretical beliefs. Critically, this article will discuss the view which argues that the purpose of natural law and positivism as theories of law, is to put forward their own opinions on how the law should be set up. Therefore, expecting them to examine the law in relation to general sociological issues is unfair and unnecessary; even more so when it comes to LGBTQ rights and issues. Lastly, this article will discuss the importance of examining the law in connection to the sociological issues, such as queer legal theory (LGBTQ).

1 Christian Tomuschat, ‘The legacy of Nuremberg’ [2006] JICJ 4(4).

2 Richard D. Heideman, ‘Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials’ [2017] LLAICLR 5.

#### The concept of Positivism and Natural law

The thesis of legal positivism according to Austin and Bentham, is the view that a valid law is whatever the recognised human authority says is law.3 The laws and commandments of the sovereign are to be obeyed, and the threat of ‘sanctioning’ is present for individuals who defy the sovereign’s law.4 Modern understanding of legal positivism, a result of the old, is the view that the rule of law is based upon social structures, enforced by the government, irrespective of its justness or unjustness. An understanding formulated by Austin as: “the existence of law is one thing; its merits and demerits another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.” 5 Meaning, the merits of a law does not determine its existence, nor does the question of a law being unjust, just, moral, immoral, efficient, or inefficient justify doubting the existence or validity of that law. A strict belief, which clearly reveals exclusive positivism as a legal theory which examines the law in its outermost abstract.

Separately, the theory of natural law arguably also examines the law in its abstract. Natural law is a moral theory (articulated by Aristotle and Aquinas) which maintains the view that law should be based on ethics; derives through reason, human and physical knowledge.6 The concept of Natural law is teleological in its basis of bringing about happiness, justice and salvation (Thomas Aquinas through Christian Natural Law).7 Natural law as a legal theory is not dependent, nor does it take into consideration all sociological issues within the nation. For these classical natural lawyers, it is said that law is not derived from sociological issues. Instead, they believe in the notion of an

3 Thomas F. Broden, ‘The Straw Man of Legal Positivism’ [1959] Notre Dame Law Review 531.

4 Raymond Wacks, ‘Understanding Jurisprudence’, An introduction to legal theory’ (5th edn, Oxford University Press 2017).

5 Raymond Wacks, ‘*Understanding Jurisprudence’, An introduction to legal theory*’ (5th edn, Oxford University Press 2017).

6 ibid.

7 Ralph McInerny, ‘Aquinas’s moral theory’ [1987] Journal of Medical ethics

<https://jme.bmj.com/content/medethics/13/1/31.full.pdf> accessed 27 February 2019.

omnipotent and omniscient God whose nature of ‘reason’, which humans have been gifted, as the thing that law should be based on.8

#### Does natural law and positivism truly examine law in its abstract?

Arguably, the concept that moral principles ought to govern law-making in natural law, questions the view of natural law being a theory that examines the law in its abstract. Natural law to some extent is an inclusive theory which connects the law to some sociological issues. This is because most sociological issues when deduced through the human capacity of reason, will be defined as fair and necessary issues that should be in connection with the law, to ensure human safety, democracy and freedom. 9 The sociological issues of race discrimination, gender inequality and class violence are issues that natural law does not question its right in being connected to law, as they can be deduced through human knowledge as principles of practical rationality.10 Additionally, the protection of individuals in danger of being discriminated against because of their race, gender, or class fits into Aquinas’ definition of law, as ‘rules of action declared by one who protects the interests of the community’.11 Thus, making the legal theory of natural law more connected to sociological issues than Austin’s legal positivism, as it’s a theory that protects the moral and ethical interests of individuals. Lastly, the possibility of Natural law being a theory which could be used to justify inhumane and unjust laws (Nazism), provided it lacked all connections to sociological patterns, is a reality which the basic understanding of natural law goes against.12 Unlike legal positivism, it is said natural lawyers believe in the

8 Raymond Wacks, ‘Understanding Jurisprudence’, An introduction to legal theory’ (5th edn, Oxford University Press 2017).

9 Suri Ratnapala, Jurisprudence (3rd edn, Cambridge University Press 2017).

10 Raymond Wacks, ‘*Understanding Jurisprudence’*, An introduction to legal theory’ (5th edn, Oxford University Press 2017).

11 Ralph McInerny, ‘Aquinas’s moral theory’ [1987] Journal of Medical ethics

<https://jme.bmj.com/content/medethics/13/1/31.full.pdf> accessed 27 February 2019.

12 Richard D. Heideman, ‘Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials’ [2017] LLAICLR 5.

maxim ‘lex iniusta non est lex’ (unjust law is not law); meaning it would completely contradict the principles of natural law if it was to entirely examine the law in its outermost abstract.13

Nevertheless, even though natural law does not examine the law in its outermost abstract, unlike legal positivism, it is however still inadequate, as it does not connect to the ‘extreme’ patterns of sociological issues that are apparent within society.14 Natural law as a moral theory is categorically ambiguous, which provides a basic defence for inhuman acts, like the discrimination of individuals within the LGBTQ community.15 Augustine himself alludes to this datum when he explained that ‘the first rule of reason is the law of nature… But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law’.16 Augustine’s view based on Christianity follows Biblical teachings and moral concepts. Specifically, the Bible wholeheartedly condemns acts of homosexuality and the changing of one’s God-given (natural) being. Leviticus, Genesis and 1 Timothy directly refers to LGBTQ individuals, as ‘abominations’, ‘unnatural desires’, ‘unrighteousness’, and acts punishable by death. Corresponding with Augustine’s view, Paul writes in 1 Timothy: ‘law is not laid down for the just but for the lawless and disobedient, for the ungodly and sinners…for the sexually immoral, men who practise homosexuality…and whatever else is contrary to sound doctrine”. A scripture, explaining that the purpose of the law, according to God, is to convict the ‘unjust’ individuals who practice these sins (identifying as LGBTQ), as it defies his gospel and contradicts ‘sound doctrine’. Evidently, through Augustine’s views, natural law is seen as a theory

13 J. S. Russell, ‘Trial by Slogan: Natural Law and Lex Iniusta Non Est Lex.’ [2000] Law and Philosophy 19(4) <[www.jstor.org/stable/3505077](http://www.jstor.org/stable/3505077)> accessed 26 February 2019. For and opposing view see: John Finns, ‘Natural Law and Natural Rights’ (Clarendon law series, 2nd edn, Oxford University Press 2011) 25 -28.

14 Dr Brent L. Picket, ‘Natural law and the Regulation of Sexuality: A critique’ [2004] Richmond Journal of Law and the public Interest < <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1076&context=jolpi>> accessed 20 March 2019.

15 H. L. A. HART, ‘*The Concept of Law’* (Clarendon law series, 3rd edn, Oxford University

Press, 2012) 9.

16 Raymond Wacks, ‘Understanding Jurisprudence’, An introduction to legal theory’ (5th edn, Oxford University Press 2017).

which does not examine queer theory (a sociological issue) in connection to the law.17 Thus, allowing for the legal oppression and discrimination of individuals that do not conform to the traditional and ‘homophobic’ views of natural law.18

#### The connection to LGBTQ rights and sociological issues

Furthermore, in comparison to positivism, the natural law approach, taken by the UK legal system allows for more subtle discrimination of LGBTQ individuals, whereas positivism allows for open and crude discrimination of LGBTQ individuals. In Gayle Rubin’s essay, ‘Thinking Sex’, she explains that the stigmatisation of homosexual relationships as ‘bad’ is a ‘vector’ of oppression.19 Like other ‘vectors’ of race, gender and class were individuals are discriminated against, because they do not fit into society’s square box of being white (race), straight (sexuality), male (gender), middle class and Christian (religion). Rubin’s view, inspired by fellow queer theorist Foucault, rejects a scientific explanation for sexuality, as in Foucault’s view, it promotes the societal discrimination of queer (LGBTQ) individuals.20 The case of *Lee v Asher’s Baking Co Ltd*, where a gay individual was denied as a customer, by a Christian bakery due to his sexuality, proves the validity of Rubin’s view.21 Unanimously, the Supreme Court ruled in favour of the bakery, explaining that ‘there had been no discrimination against the plaintiff on grounds of sexual orientation’.22 A decision which when critically analysed, shows how the

17 Alexander Dmitrenko, ‘Natural Law or Liberalism? Gay Rights in the new Eastern Europe’ [2001] University of Toronto

<https://tspace.library.utoronto.ca/bitstream/1807/15216/1/MQ63077.pdf> accessed 19

March 2019.

18 ibid.

19 Gayle Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ [1984]

<<http://sites.middlebury.edu/sexandsociety/files/2015/01/Rubin-Thinking-Sex.pdf>> accessed 18 March 2019.

20 Brenda Cossman, ‘Sexuality, Queer Theory, and Feminism after: Reading and Rereading the Sexual Subject’ [2004] McGill Law Journal 49(4).

21 Lee v Asher’s Baking Co Ltd [2018] UKSC 49.

22 ibid.

natural law approach taken by the UK legal system subtly chooses the rights of heterosexual Christians over individuals within the LGBTQ community.23 Additionally, the question of: would the Court deem right, a ‘gay’ bakery rejecting a Christian customer with the slogan: ‘support Christian rights’? The answer, established through the normalised societal discrimination and oppression of homosexuals as second-class citizens, will result in the Courts finding the ‘gay’ bakery guilty on the grounds of discrimination.24 Therefore, alluding to the fact that the connection between natural law, positivism and LGBTQ rights is one of acknowledgement, to save face and not one of inclusion.25

#### The Consequences

Also, the positivist foundation of law, some ‘religious’ countries from Africa and the Middle East possess, allow for the continued oppression of LGBTQ individuals.26 The Natural law approach by these countries also enforces and sustain such oppression. In Hart’s book, ‘The Concept of Law’, he expresses that “…a society of law contains those who look upon its rules from the internal point of view as accepted standards of behaviour …”.27 Here, Hart explains that the positivist approach any sovereign takes, is to their own risk, as its exclusive rules will be ‘accepted [as] standards of behaviour’.28 Meaning if a sovereign establishes LGBTQ living as ‘immoral’ or criminal, its citizens will take that as a standard of living, allowing for the oppression of individuals

23 Bruce Ryder, ‘Straight Talk: Male heterosexual Privilege’ [1991] Queens law Journal 16(2).

24 D’Amato Anthony, ‘The effect of the legal Theories on Judicial Decisions’ [1999] Chicago- Kent Law Review 74(2).

25Tim Kaye, ‘Natural law theory and legal positivism: two sides of the same practical coin?’ [1987] JLS 14(3).

26 Jeff Diamant, ‘The countries with the 10 largest Christian populations and the 10 largest Muslim populations’ [2019] Pew Research Center <https://[www.pewresearch.org/fact-](http://www.pewresearch.org/fact-) tank/2019/04/01/the-countries-with-the-10-largest-christian-populations-and-the-10- largest-muslim-populations/> accessed 16 April 2019.

27 H. L. A. HART, ‘The Concept of Law’ (Clarendon law series, 3rd edn, Oxford University Press, 2012) 9.

28 ibid.

that do not conform to this idea. Thus, proving the inadequacy of having theories of law that examine the law, even in its slightest abstract.

Critically, however, that the purpose of natural law and positivism as theories of law is to put forward their own opinions on how the law should be established.29 Therefore, expecting them to examine the law in relation to general sociological issues is unfair and damaging. Causing both theories to be classed as contradicting, and making impossible, the application of the theory to any law; as it would be deemed as inconsistent and hypocritical. For example, if natural law was to be examined in connection to both race and sexuality, it will undoubtedly contradict itself, causing numerous criticisms, and the failure of the theory. This is because natural law will say: the discrimination of an individual because of their race is wrong and immoral whilst under the same breath condemning the actions of LGBTQ individuals as immoral also. Hence, validating the argument which expresses that the examining of law in its abstract, allows for a more thorough and accurate analysis of the law.

Nonetheless, the examining of law in its abstract by both theories, offer a basic defence for inhumane actions such as Nazism and LGBTQ discrimination.30 This is because both theories lack the understanding and rewards of having laws derive from sociological issues which directly influences the lives of individuals. Taking Nazism, and the Nuremberg trial as an example, positivism can be used to justify the systematic killing of millions of people just because they were of a different race, class, religious belief and sexuality.31 Also, the belief that morality should be separate from the law (classic Positivism) permitted Nazis and supporters to rationalise and enforce

29 Suri Ratnapala, *Jurisprudence* (3rd edn, Cambridge University Press 2017).

30 Thomas Mueller and Thomas Beddies, ‘‘The Destruction of Life Unworthy of Living’ in National Socialist Germany’ [2006] International Journal of Mental Health, 35(3)

<[www.jstor.org/stable/41345178](http://www.jstor.org/stable/41345178)> accessed 15 March 2019.

31 Ben S. Austin, ‘The Nuremberg Trails: Brief Overview of Defendants & Verdicts’ [2015] Jewish Virtual Library

<<https://www.jewishvirtuallibrary.org/jsource/Holocaust/verdicts.html#top>> accessed 14

March 2019.

their inhumane actions (basic defence).32 Furthermore, the positivist foundation upon which Nazism thrived, caused the breakdown of the ethical German legal system, by coercing Nazi beliefs on German individuals and forming a Nazi social construct; making it easier to tyrannize its citizens.33 The positivist idea of examining law independently, from sociological issues is a dangerous ideology which justifies immoral actions any government commits. This is insufficient as it creates a nation, whereby justice and morals do not exist. Morally, positivism (excluding Hart’s positivist view of there being a ‘point of intersection between law and morals’), is as an inadequate theory in its self; unlike that of Liberalism, ‘where it is followed for the continued advancement of gay and lesbian rights’.34

#### Conclusion

The various inhumane problems that concern the LGBTQ community are not addressed by either natural law or positivism. Therefore, making them without contradiction inadequate theories of law. Also, the disregard for the question of to what extent does ‘our’ examining of law in its abstract affect the sociological needs of individuals clearly, portray the insufficiency of natural law and positivism. Indicating to the fact that, the humane and basic needs of individuals will not be met, nor will their human rights be protected. Moreover, the abstract examination of the law ultimately allows for the legal oppression of individuals that do not conform to the ideas of the sovereign (derived through reason), such as individuals which identify as LGBTQ, while causing

32 Kenny Yang, ‘The Rise of Legal Positivism in Germany: a Prelude to Nazi Arbitrariness?’ [2012] 3 The Western Australian Jurist <https://[www.murdoch.edu.au/School-of-](http://www.murdoch.edu.au/School-of-) Law/\_document/WA-jurist-documents/WAJ\_Vol3\_2012\_Yang---The-Rise-of-Legal- Positivism.pdf> accessed 15 March 2019.

33 Richard D. Heideman, ‘Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials’ [2017] LLAICLR 5.

34 Alexander Dmitrenko, ‘Natural Law or Liberalism? Gay Rights in the new Eastern Europe’ [2001] University of Toronto

<<https://tspace.library.utoronto.ca/bitstream/1807/15216/1/MQ63077.pdf>> accessed 13 March 2019; H. L. A. Hart, ‘Positivism and the Separation of Law and Morals’ [1958] HLR 529.

unanswerable questions, in practical administration.35 Overall, showing the inadequacy of examining law in its abstract.

35 Francisco Valdes, ‘AFTERWORD Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship Or Legal Scholars as Cultural Warriors’ [1998] University of Miami School of Law Institutional Repository

<<https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1502&context=fac_articles>> accessed 23 March 2019.

# Legal Systems

#### Legislation in the Digital Age

*Parmveer Bains*

Gaps in the legal system are inevitable as the law constantly creates and recreates itself.1 This can lead to gaps and inconsistencies in the legal system and new problems arising especially in the digital age where new technology and software is being developed changing the way we go about our everyday lives. The digital age can refer to when computing and the use of technology had become a key characteristic of human activity.2 Because of this modern development this has led to the rise of new problems for law makers and the public as the digital age can create new needs and requirements from the law for problems which previously were not an issue.

One view of the relationship between law and social change is that the law should follow the changes that occur in society.3 This is very important in our modern ‘information’ society where technology advances quickly. The issue with this is that the law struggles to keep up to date with these advances as the legal system moves slowly in comparison to technological developments.4 A key example of where this has been a problem is when additional statues needed to be created during the period when computing started to move away from academic and military uses and into the public and commercial domains.5 This resulted in privacy issues becoming a serious concern in the late 1960s.6 As a counter measure two government-appointed

1 Liina Reisberg, “Gaps in the Law Fulfilled with Meaning: A Semiotic Approach for Decoding Gaps in Law” (2017) 30 International Journal for the Semiotics of Law 697.

2 Victor C. X. Wang, *Handbook of Research on Learning Outcomes and Opportunities in the*

*Digital Age (Advances in Educational Technologies and Instructional Design)* (1st edn, IGI Global 2015) 439.

3 Steven Vago, *Law and Society* (10th edn, Prentice Hall 2011) 310.

4 ibid.

5 Adam Warren, James Dearnly, Data Protection Legislation in the United Kingdom (2005) 8 Information, Communication & Society 238.

6 ibid.

committees were used to consider the need for data protection legislation.7 However, due to the slow process of the English legal system it had taken 14 years for the Data Protection Act 19848 to be implemented.9 This shows how the law is vulnerable to new creations and ideas such as the advancement of technology and software which can cause day to day life to change. This is more problematic due to the fast progress of technology compared to the slow movement of the legal system this is especially evident for the UK as Parliament enacts around nearly 3,000 pages of statutes on various issues in the form of Acts every year.10

As more people put their personal data online due to the increasing popularity of social media platforms it was inevitable that the law was needed to protect an individual’s private information, which can be stored online. This was a major issue law makers faced during the Cambridge Analytical scandal.11 This scandal was where it was discovered that the data mining firm Cambridge Analytical had improperly collected and sold data of 50 million Facebook users to third parties including Donald Trump’s presidential campaign who the firm had worked for.12 The firm was able to get access to this data because Facebook had previously allowed app developers to have access to Facebook user’s data,13 however since then Facebook has changed developer access to this data as a response to this issue.14 This scandal caused the CEO of Facebook Mark Zuckerberg to testify in Congress in April 201815 this involved Zuckerberg answering questions

7 ibid.

8 Data Protection Act 1984.

9 ibid.

10 Scott Slorach, Judith Embley, Peter Goodchild and Catherine Shepard, *Legal Systems and Skills* (3rd edn Oxford University Press 2017) 103.

11 Gillian Tett, ‘Why we should open the Cambridge Analytica data vault’ *Financial Time* (24 April 2004).

12 ibid.

13 Kurt Wagner, ‘Here’s how Facebook allowed Cambridge Analytica to get data for 50 million users’ (Vox, 17 May 2018) <[https://www.vox.com/2018/3/17/17134072/facebook-](https://www.vox.com/2018/3/17/17134072/facebook-cambridge-analytica-trump-explained-user-data) [cambridge-analytica-trump-explained-user-data](https://www.vox.com/2018/3/17/17134072/facebook-cambridge-analytica-trump-explained-user-data)> accessed 10 July 2019.

14 Tim Bradshaw ‘SEC opens investigation into Facebook data breach’ *Financial Times* (Los Angeles, 3 July 2018).

15 A.S.B, ‘Why is Mark Zuckerberg testifying in Congress?’ (The Economist, 8 April 2018)

<[https://www.economist.com/the-economist-explains/2018/04/09/why-is-mark-](https://www.economist.com/the-economist-explains/2018/04/09/why-is-mark-zuckerberg-testifying-in-congress) [zuckerberg-testifying-in-congress](https://www.economist.com/the-economist-explains/2018/04/09/why-is-mark-zuckerberg-testifying-in-congress)> accessed 12 July 2019.

from senators and congressmen on Facebook’s privacy policy, data mining, regulations, storage of data and Cambridge Analytica.16 One of the aims of these hearings was for lawmakers to decide how to best regulate these online platforms such as having new constraints on online data collection. For example after Zuckerberg’s hearing a new bill labelled the Consent Act was introduced which would requires explicit consent from users to use, share, or sell any personal information and add new security and breach reporting requirements17 similar to Europe’s General Data Protection Regulation.18 This is a key example of how the digital age requires lawmakers to create new policies in order to protect individuals from online harms such as data breaches.

As technology plays a key role in our everyday lives with education, entertainment and merchandising it would be inevitable that the fast paced movement of digitisation would cause the demand for existing legislation to be updated to account for these new changes.19 An example of this was the public demand for gambling laws to be adapted to include gambling in video games which targeted children.20 This was the result of an increase of game publishers adopting and modifying gambling techniques into their games by implementing a loot box microtransaction system where players can use real world currency to unlock loot boxes to earn random in game items this was seen as a similar technique used by casino slot machines.21 A major concern is that some games with these systems are targeted at children who are not legally allowed to gamble this is an example of how the progress of

16 Chloe Watson, ‘The key moments from Mark Zuckerberg's testimony to Congress’ (The Guardian, 11 April 2018) <[https://www.theguardian.com/technology/2018/apr/11/mark-](https://www.theguardian.com/technology/2018/apr/11/mark-zuckerbergs-testimony-to-congress-the-key-moments) [zuckerbergs-testimony-to-congress-the-key-moments](https://www.theguardian.com/technology/2018/apr/11/mark-zuckerbergs-testimony-to-congress-the-key-moments)> accessed 12 July 2019.

17 Russell Brandom, ‘After Facebook hearing, senators roll out new bill restraining online data use’ (The Verge, 10 April)

<[https://www.theverge.com/2018/4/10/17221046/facebook-data-consent-act-privacy-bill-](https://www.theverge.com/2018/4/10/17221046/facebook-data-consent-act-privacy-bill-markey-blumenthal) [markey-blumenthal](https://www.theverge.com/2018/4/10/17221046/facebook-data-consent-act-privacy-bill-markey-blumenthal)> accessed 12 July 2019.

18 Mehreen Khan, Aliya Ram, ‘What the EU’s tough new privacy rules mean for Big Tech’

*Financial Times* (Brussels, London, 4 April 2018).

19 Steven Vago, *Law and Society* (10th edn, Prentice Hall 2011) 313.

20 Emma Kent, ‘15 European gambling regulators unite to tackle loot box threat Along with Washington State’ (EuroGamer, 17 September 2018)

<[https://www.eurogamer.net/articles/2018-09-17-15-european-gambling-regulators-unite-](https://www.eurogamer.net/articles/2018-09-17-15-european-gambling-regulators-unite-to-tackle-loot-box-threat) [to-tackle-loot-box-threat](https://www.eurogamer.net/articles/2018-09-17-15-european-gambling-regulators-unite-to-tackle-loot-box-threat)> accessed 8 February 2019.

21 ibid.

technology and software could potentially create loopholes in already established laws such as the Gambling Act 2005.22 This gap created uncertainty in the law leading to the definition of gambling to be questioned and whether children were being exposed to these gambling habits even resulting in the DCMS (Digital, Culture, Media and Sport Committee) investigating this issue.23 This shows how the Gambling Act 2005 could not foresee this issue as this is a relatively new problem in our current society.

This issue caused a government response where the Gambling Commission released a position paper in March 2017 detailing existing protections on this issue.24 The Law Commission is a statutory independent body created by the Law Commissions Act 196525 to keep the law of England and Wales under review and to recommend reform.26 The aim of the Law Commission is to keep the law fair, simple and modern.27 This is done by commissioners studying the area of law in question and identifying its defects.28 This is an example of an institution used to research and fix these gaps that occur in the legal system such as the recent issue of gambling. The Law Commission is a good safeguard in insuring the law is amended from these gaps which occur as the Law Commission is used to investigate problems with current laws and to recommend reform based on research which could reflect the needs of society which including the increased digital media use from the public.29

Overall the increased use and development of technology by the public has caused various problems such as breaches in personal data and created new

22 Gambling Act 2005.

23 Zoe Kleinman, 'My son spent £3,160 in one game' (BBC, 19 July 2019)

<[https://www.bbc.co.uk/news/technology-](https://www.bbc.co.uk/news/technology-48925623?ns_source=facebook&ns_mchannel=social&ocid=socialflow_facebook&ns_campaign=bbcnews) [48925623?ns\_source=facebook&ns\_mchannel=social&ocid=socialflow\_facebook&ns\_campai](https://www.bbc.co.uk/news/technology-48925623?ns_source=facebook&ns_mchannel=social&ocid=socialflow_facebook&ns_campaign=bbcnews) [gn=bbcnews](https://www.bbc.co.uk/news/technology-48925623?ns_source=facebook&ns_mchannel=social&ocid=socialflow_facebook&ns_campaign=bbcnews)> accessed 21 July 2019.

24 Tim Miller, ‘Loot boxes within video games’(Gambling Commission, 24 November 2017)

<[https://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-](https://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-boxes-within-video-games.aspx) [boxes-within-video-games.aspx](https://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-boxes-within-video-games.aspx)> accessed 8 February 2019.

25 Law Commission Act 1964.

26 Shona Wilson Stark, The Work of the British Law Commissions: Law Reform... Now? (first published 2017, Hart Publishing 2017) 35.

27 ibid 154.

28 ibid.

gaps in existing laws which need to be addressed. However with the slow process of the legal system it can take long periods of time for new issues to be officially accounted for in statute. This means the best the law can do in its current state is to catch up to society’s needs and to find solutions on a case by case bases allowing legislation to catch up to society’s ever-changing needs.

**Case Note – *Alder Hey Children’s Hospital NHS Foundation Trust v Evans***

#### [2018] EWHC 308 (Fam)

*Jermaine Dixon and Amir Al-Monsur*

The case brought by Alder Hey Children’s Trust (the Trust) in mid-December 2017, brought to light the unfortunate but apparent untreatable damage, caused by a neurodegenerative disease to Alfie Evans. Alfie was showing no response to physical, visual, auditory or sensory stimulation, bringing experts to the consensus that his disease was ‘untreatable’1 and his brain ‘entirely beyond recovery’2. The inability to receive, process and transmit information through electrical and chemical signalling, meant there was a risk to Alfie’s life. Based on these facts the Trust was questioning the lawfulness of withdrawing ventilatory support, which was keeping Alfie alive. They believed this would be in his best interest. Alfie’s parents, Tom Evans and Kate James were requesting the courts to allow further treatment for Alfie in Rome and Munich. In the first instant the High Court ruled the request brought by Mr Evans was ‘irreconcilable with Alfie’s best interests’3 and it ‘compromises Alfie’s future dignity and fails to respect his autonomy’4. In granting the trust permission to remove ventilatory support, some significant legal issues arose, namely, the issue of best interest and whose right it is to decide the best interest of a child.

The most significant issue is that of best interest, which brought adversary between the parents and the courts as to what constitutes best interest.

Albeit contentious, the legal issue of best interest places the law in favour of the court. The parents were of the view that further medical treatment would be in Alfie’s best interest. Perhaps because of the possibility of exploring all probable treatments, hence their application for habeas corpus (discharged), claiming the court’s decision infringed on their human rights. Alfie’s parents

1 *Alder Hey Children’s NHS Foundation Trust v Evans* [2018] EWHC 308 (Fam) [19].

2 ibid [16].

3 ibid [35].

4 ibid [66].

sought to take him to Rome and a writ of habeas corpus for his release, which the court rejected. This was because of the risk of suffering more “pain”5. The court summarised axiomatically in that, “the continued provision of ventilation, in circumstances which I am persuaded is futile, now compromises Alfie's future dignity and fails to respect his autonomy. I am satisfied that continued ventilatory support is no longer in Alfie's best interest”6. The judge’s comments highlighted the underlying issues in Alfie’s case. In the case of *Yates and Gard v Great Ormond Street*, Macfarlane LJ observed, the child’s best interest trumps all, however fraught7. Furthermore, in the case of *Aintree University Hospital NHS Trust v James,* Baroness Hale profoundly balanced best interest as providing treatment verses withholding treatment8. Applying the test, focused particularly on Alfie, his welfare and perspective treatment. Having examined both cases, granting the application arguably was in Alfie’s best interest. The judgement was fully endorsed by the Court of Appeal and the European Court of Human Rights, who both remain unimpeached in their decision9.

The decision to grant the application, had a huge impact on legal issues pertaining the courts and the medical profession. Contrary to the parent’s views, the issue of best interest is a legal test, meaning that their partial and morality-based views cannot be substituted for the ‘impartial, reasoned and evidence-based decision’10 of the court. This is substantiated by Professor Freeman, who highlighted the ‘risk that parents could not separate their interests from the child's and they might act thinking they were doing the best for their children but actually doing the best for themselves’11, thereby supporting the court’s decision. Ultimately, the court’s judgement presides, because Alfie’s illness has no known cure. From an impartial perspective, it

5 ibid.

6 ibid.

7 *Yates and Gard v Great Ormond Street Hospital for Children NHS Foundation Trust* [2017] EWCA Civ 410.

8 *Aintree University Hospital NHS Trust v James* [2013] UKSC 67.

9 *Alder Hey Children’s NHS Foundation Trust v Evans* [2018] EWHC 953 (Fam).

10 Andrew Venables, ‘Family Justice Council Debate 2017’ [2018], Fam Law,

<https://[www.lexisnexis.com/uk/legal/search/journalssubmitForm.do](http://www.lexisnexis.com/uk/legal/search/journalssubmitForm.do)>, accessed 17th November 2018.

11 ibid.

is an immoral decision to keep him alive against natures will. There was ‘no change at all’12 to his condition, suggesting medically that Alfie was dead13. Arguably, keeping him alive was infringing on his right to peace and privacy, thus reducing the credibility of Joseph Dute. Joseph Dute agreed with the parents that ‘a hospital's decision not to pursue an experimental treatment and to withdraw life-sustaining treatment from a baby, contrary to his parents' wishes, and the confirmation of the lawfulness of the hospital's decision by the domestic courts breached ECHR arts 2 and 8’14. They further claimed the decision had infringed their ‘right to respect for private and family life’. The court held that the appeal ‘was manifestly ill-founded’15.

In the refusal to the Supreme Court, Lady Hale argues, ‘a child, unlike most adults, lacks the capacity to make decisions about future arrangements for themselves. Where there is a dispute, it is for the court to decide, as it would in respect of an adult without capacity,’ and claiming, ‘this is the gold standard by which most of these decisions are reached’. She further state, ‘this is the gold standard by which most of the decisions are needed, it is an assessment of best interest that has been concluded to be perfectly clear’16. The same ‘gold standard’ or ‘best interest’ test was applied in *Piglowska v Piglowski17*, further substantiating Lady Hale’s view. Furthermore, Regulation B2R, brought into force by the Family Act 198618, addresses the issue of Italian citizenship, giving the courts the ‘responsibility over a child habitually resident’19 in a state. The Italian government granted Alife citizenship under the EU ‘freedom of movement’. Given that Alfie had never been to Italy Lady

12 *Evans v Alder Hey Children's NHS Foundation Trust* [2018] EWCA 984 (Civ) [16].

13 Because the ‘the brain stem is irreversibly destroyed by a lack of oxygen, so too are the other parts of the brain’.

14 Joseph Dute, ‘European Journal of Health Law’ [2018], EJHL,

<[https://login.westlaw.co.uk/maf/wluk/app/document?&srguid=i0ad69f8e0000016721482](https://login.westlaw.co.uk/maf/wluk/app/document?&srguid=i0ad69f8e0000016721482424289b00cc&docguid) [424289b00cc&docguid](https://login.westlaw.co.uk/maf/wluk/app/document?&srguid=i0ad69f8e0000016721482424289b00cc&docguid)>, accessed 17 November 2018.

15 *Alder Hey Children's NHS Foundation Trust v Evans* [2018] EWCA (Civ) 805 [31].

16 *Alder Hey Children’s NHS Foundation Trust v Evans* [2018] EWHC 818 (Fam) [8].

17 ibid [9].

18 ibid.

19 *Alder Hey Children's NHS Foundation Trust v Evans* [2018] EWHC 953 (Fam).

Hale affirmed ‘Italian jurisdiction should not supersede that of this court’20. Notwithstanding this, the parents were not willing to accept Alfie’s situation.

The courts deciding the best interests of a child over the parents highlights another issue, which many view an abuse of power. This reflects public opinion, who do not have the necessary legal knowledge surrounding the issue. Contrary, to public opinion, courts have the right to decide best interest, as it is a power given to them by the Children Act 198921. This gives the court the right ‘in any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child’22. Further corroborated by article 3 of the Convention on the Rights of the Child which states, ‘courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’23, further enforcing the courts right to decide. Additionally, the constitutional provision of parliamentary sovereignty means that the courts are legally bound by the Children Act to decide what is in the best interest. Whereas, if we had a codified constitution, rights would have been laid out as part of the highest source of law, like in the United States which would mean nothing could infringe upon those entrenched rights.

Arguably, in Alfie’s case it can be said the courts had gone beyond their powers, *ultra vires*, because they infringed on the parents Article 8 ‘right to respect for private and family life’ by preventing the family seeking further medical treatment for Alfie. The courts were seen to have gone beyond their powers in *R (Miller) v Secretary of State for Existing the European Union24*; where the court ruled, the government had gone beyond their power in trying to trigger Article 50 without parliamentary consent. Arguably, in the case of Alfie the courts, similarly were ultra vires. Therefore, making justices

20 ibid.

21 Children Act 1989, s2 (2).

22 ibid.

23 Article 3 of Convention on the Rights of the Child. <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

24 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

appear ‘enemies of the people’25 and using ‘guerrilla warfare tactics’26 and supposedly taking peoples liberty, effectively making them look like arbitrary figures. However, the court’s judgement took into consideration all the factors discussed and decided that it was in the best interest of the child.

Furthermore, there was established precedent in Great Ormand Street Hospital for Children NHS Foundation Trust v Yates27, both High Court and Court of Appeal ‘normally binds itself’28, it was unlikely therefore to establish new precedent. Professor Cave argues the legal principles in the Gard case ‘were compassionately and correctly applied’29, further supporting the correct decision of the courts.

25 James Slack, *Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis*, The Daily Mail (3rd November 2016).

26 Andrew Griffin, *’Alfie Evans: Medical experts speak out about ‘guerrilla warfare tactics’ being used against family and doctors’,* Independent, (Thursday 26th April 2018).

27 *Great Ormand Street Hospital for Children NHS Foundation Trust v Yates* [2017] EWHC

1909 (Fam).

28 Scott Slorach, Judith Embley, Peter Goodhill and Catherine Shepard, *Legal Skills & Systems,*

(Oxford University Press 2017).

29 Emma Cave, *Who Knows Best (Interests)? The Case of Charlie Gard*, (1st September 2018), Med Law Rev (2018) 26 (3): 500.