THE SECRET BARRISTER

FAKE LAW

The Truth About Justice in an Age of Lies

PICADOR

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Introduction

On 20 February 2018, fifty-two years, three months and eleven days after capital punishment in Great Britain was abolished, the state ordered that a baby be put to death.[1] An unelected[2] High Court judge, sitting in the shadowy Family Division at the Royal Courts of Justice in London, rapped his gavel[3] and ruled, in accordance with government dogma, that the life of a poorly child could not be justified within the budgetary constraints of the National Health Service.[4]

Over the next two months, as the child's parents tried in vain to save their son's life, successive tiers of the silhouetted British and European judiciary would agree – on no less than eight occasions – that, notwithstanding the availability of viable medical treatment,[5] the child should die. The governmental Death Panel[6] had spoken, just as it had, barely twelve months earlier, when a similarly unwell infant was denied life-saving treatment by a legal system prioritising its fidelity to the logical conclusions of socialised medicine ahead of basic respect for human life.[7]

In another year, in another British court, a similarly out-of-touch judge acceded to the pleas of an illegal immigrant who took the stand to contest his deportation, after he committed serious criminal offences. The reason for the decision to let this man remain? It was because – and I am not making this up – he had a pet cat.[8] A victory for the European Union's Human Rights Act,[9] putting British citizens at risk so that the nation's migrant cats might sleep sounder in their baskets.

Outside the caprice of the courtroom, hard-working taxpayers find themselves daily footing the bill for our country's voracious compensation culture, as local authorities and our National Health Service throw millions of pounds of public money at defending ridiculous claims, from cleaners pocketing nine grand for tripping over mops,[10] to the jackpot figures[11] paid to litigious employees

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aboard the gravy train[12] of the discrimination industry.[13] Added to our unsustainable legal-aid bill – the most expensive in the world,[14] most of which lines the pockets of illegal immigrants, criminals and their jihadist-facilitating lawyers[15] – it's no wonder the nation's finances are in their present state.

And, as for them, those foreign criminals and illegal immigrants, the law is of course on their side.[16] The statue of Lady Justice stands blindfolded atop the Old Bailey[17] for good reason: our pusillanimous justice system turns a blind eye to those who harm us, those who walk free from court despite being convicted of the most appalling crimes. The rights of the victim are subjugated to the rights of the criminal;[18] try defending your home against a burglar and you'll be arrested for a breach of their human rights before you can pick the shrapnel out of your thigh.[19] The few offenders who do go to 'prison' find something resembling a holiday camp – Butlin's with bars[20] – reclining in front of free Sky TV in four-star hospitality until they are let out early.

We shouldn't, of course, be surprised. When activist judges,[21] seeking to impose their own liberal leanings upon the downtrodden denizens of our once green and pleasant land, openly declare war on democracy,[22] defying the will of the people in service of the judiciary's secret political agenda,[23] it's a miracle that anything resembling justice is spat out of our ailing, failing legal system. Enemies of the people,[24] the lot of them.

If there's one thing you can be sure of, it is that the law, whatever it does, does not work for you.

The likelihood is that you will have heard something of the cases and themes above over recent years, whether in the press, on social media or folded into the rhetoric of an earnest politician. The complaints are familiar and recurring. Unfurl a newspaper or click on a weblink, and the evidence is compelling. The law, as some angry blogger once said, is broken.[25]

Except, of course, that every legal detail in those stories is untrue. They are examples of what a marketing mogul with a keen eye for neologisms might term Fake Law: distortions of legal cases and judgments, spun and reformed for mass consumption. They represent a phenomenon that is far from new, but which, in an age

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when an errant headline can reach a million Twitter users in a single baited click, is becoming broader in scope, longer in reach and exponentially more difficult to counter.

And the above myths, and the thousands like them, are what this book aims to address. For, while most of us can equip ourselves reasonably well to critically assess news stories or commentary in many walks of life, legal stories throw up particular obstacles.

Law is inherently – and often unnecessarily – complex and alienating to a non-legal audience. Finding the answer to a straightforward question – such as, *What does the law say about my right to defend myself in my home?* – is not simply a matter of going to a conveniently labelled statute online and reading what it says.

For one, we churn out new laws quicker than the government can publish them. Unfortunately, and consequently, legislation.gov.uk, the official government website responsible for publishing freely accessible versions of the law, has not been up to date for decades. While there have been improvements in the last few years,[26] at the time of writing, 2 per cent[27] of the statutes and statutory instruments (laws issued by ministers under powers granted by Acts of Parliament) on the website had 'outstanding effects' marked on them. In other words, one in fifty of the laws on the official government website were wrong. The website boasts 6.5 million pages.[28] That's a lot of inaccurate legislation lying in wait to trip up the casual browser.

But this is only part of the issue. Unlike civil law jurisdictions, such as France, where the bulk of the country's law is codified, we have, since Henry II's declaration at the Assize of Clarendon in 1166, been faithful to the 'common law' tradition, where the senior courts (today, the High Court, Court of Appeal and Supreme Court) have the power to 'make' law. Where a case involves an issue of interpretation or clarification of legislation passed by Parliament, our most senior judges will hand down judgments which have the effect of binding all lower courts (the doctrine of precedent). This means that, if you wish to understand what a statute means, it is not enough to simply locate an up-to-date version; once that quest is completed, you will need to know what further gloss has been coated over it by case law. And accessing case law – let alone

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interpreting and extracting the esoteric legal principles judicially parsed within – presents similar difficulties.

The official provider of free, up-to-date online case law is the British and Irish Legal Information Institute (BAILII), a charity subcontracted by the Ministry of Justice to publish the text of new case law on its website. BAILII performs a heroic task of uploading hundreds of new judgments each month from the various senior courts and tribunals from across the United Kingdom, but, as a charity dependent on donations (heaven forfend the Ministry of Justice fully fund this endeavour), it has its limits. A recent analysis showed that, while the leading commercial case law provider published 74,010 judgments between 2007 and 2017, BAILII was able to upload only 30,583 – well under half.[29] BAILII is also unable to offer either the search functionality of commercial legal databases used by professionals, or the helpful commentary on each case explaining the relevance and significance of the decision. Therefore, unless you know exactly what you are looking for, you will soon hit a brick wall. Ridiculously, BAILII is also restricted by copyright from publishing judgments from cases pre-1996, the very text of our laws having seemingly been procured and exploited for private gain.[30]

For a member of the public, all of this means that, unless you have access to a commercial legal database, at a subscription per year running into four figures, or the updated practitioner textbooks in every legal discipline, it is virtually impossible even to locate the applicable law.

Even if you succeed in tracking down the relevant statute and case law, comprehending its application in practice presents a separate, often insurmountable challenge. The language of the law – both its statutory drafting and judgments handed down by the courts – can appear deliberately alienating to a citizen in the third millennium. While the civil and criminal courts have formally vowed to abstain from the routine use of Latin, some participants cling onto it. Barristers in criminal proceedings will still casually slip into *res gestae*, *mens rea* or *novus actus interveniens*. Old-school civil practitioners still speak in terms of *ex parte*, *mandamus* and *certiorari*. Abstruse legalese remains scrawled throughout the legal process. The criminal law retains its fondness for old, comfy Victorian statutes to prosecute most offences of violence[31] (and

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some of minor public nuisance[32] – being an 'incorrigible rogue' is still a prosecutable criminal offence), and the formal courtroom exchanges between counsel and judge invariably sound lifted from another epoch. 'May it please Your Honour, my learned friend and I have considered the position and the view at the Bar is that this would fall within the *res gestae* exception' is a sentence that may trip off the tongue of a criminal lawyer, but makes little sense to anybody in the public gallery. Dragging the legal system kicking and screaming into the twentieth century is still on the to-do list in the second decade of the twenty-first.

Our education system only compounds the problem. Despite the law underpinning every facet of our existence, from prior to our birth through to and beyond our death, English and Welsh schooling has historically placed no emphasis whatsoever on legal education. How are laws made? What are our rights? How does the justice system work? What is the court hierarchy?[33] What is the difference between a solicitor and a barrister?[34] Or a judge and a magistrate?[35] Such themes, if they are explored at all, are shoehorned into unfashionable Citizenship or General Studies curricula, rather than celebrated in their own right as a key pillar of education, as important as language or maths.

Part of the blame also lies with us in the legal profession, tutting at the public's failure to understand what we do, whilst jealously guarding our knowledge. While the social-media age has brought forth a generation of writers, bloggers and tweeters doing their best to kick down the doors to the courtroom and shine a torch on the arcane activity inside, our historically well-earned reputation as aloof keepers of the keys, cloaked in black and speaking in tongues, means that many citizens feel irredeemably disconnected from the legal system and its players. The historically well-deserved reputation of the legal profession as the preserve of the privately educated, upper-middle-class Oxbridge elite – a homogeny of plummy voices and white faces – has erected barriers to access and understanding which are only now, belatedly, being taken seriously by the profession.

Putting this all together, it is little surprise that, according to research reported in 2019, the British public is 'dangerously ignorant' about the law, with more than a third of those surveyed not knowing the difference between criminal and civil courts.[36]

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Consequently, and inevitably, a report by Citizens Advice suggested that only two in five people have faith in the justice system.[37] And it is equally unsurprising that many people rely on secondary – and, unbeknownst to them, unreliable – sources to piece together their understanding of the law.

This disconnect, I agree, is dangerous. Because the law belongs to all of us. Society only functions if we all abide by common, agreed rules. If we don't understand our justice system, and if our comprehension is corrupted by misinformation, we can't properly engage with arguments over its functioning. We can't critically evaluate its performance, identify its flaws, propose sensible reform or even participate meaningfully in everyday conversation about the stories in the news. Our unfamiliarity also makes us vulnerable to those who would exploit the gaps in our knowledge to push ulterior agendas.

That, I hope, is where this book comes in. By examining the core principles of our legal system in action in some of the flashpoints that have occupied centre stage in the news cycle over recent years, we can see where common understanding departs from reality. We will look at how the law actually works, and why it operates in the way it does, with the aim that, when confronted with the stranger-than-fiction harrumphs of the professionally outraged, we are better equipped to scrutinise their claims.

Please don't mistake this for an apologia for the legal system. The law is not perfect. I am not proffering a full-throated defence of the justice system, its characters or how it operates. There is much wrong with the way we do justice. With criminal law alone, for instance, in which I specialise, there are enough stories of how the law is broken to fill a book. But the risk is that, by allowing our attention and energies to be diverted onto 'the law is an ass' outrages which have, on their true facts, entirely mundane explanations, we become distracted from the problems that really do exist with justice.

And so it often proves: amid the smoke and klaxons accompanying the Fake Law stories, we miss the plaintive cries of those truly betrayed or failed by the law.

This, I will suggest, is not accidental. The narratives that we are fed about how and why the law doesn't work – what is shouted from the front pages and what is muted – are deliberately

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configured. Sometimes, the agenda will simply be boosting circulation or garnering clicks. But sometimes it runs far deeper. Sometimes, it amounts to a calculated attempt by vested interests to undermine and chip away at our individual rights and protections, the first principles that bind us together, and, ultimately, the very foundations of our justice system.

This book is about those, real, enemies of the people. What are the truths about our justice system that they are so eager to mask? What, through coordinated dissemination of half-baked half-truths, rhetorical sleight of hand and outright lies, do they hope to gain? And what are we, the people, at risk of losing?

It is not comprehensive. It cannot cover all facets of the law. But it will drill into some of the most commonly discussed aspects of the justice system, exploring the operation and (mis)representation of the law in some of the most important areas of our lives. What does the law really say about us? Our children? Our jobs? Our society?

Similarly, not every legal myth given airtime can be debunked. However, I hope that we can cover enough ground so that, when it comes to discussing some of the bigger legal stories that elbow their way into the spotlight, we are better armed to properly understand the reality behind the headlines, to recognise the myths, the lies and the agenda, and to identify the motives of those seeking to prey on our unfamiliarity.

And if that is too ambitious, then may I at least press home, at the earliest possible stage and with as much vigour as words on a page can convey, on behalf of all legal practitioners the length and breadth of our fair nation, the following central truth of our justice system: GAVELS ARE NOT, AND HAVE NEVER BEEN, USED BY JUDGES IN ENGLISH AND WELSH COURTS.[38]

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1. Yourself and Your Home

> 'Householders who act instinctively and honestly in self-defence are victims of crime and should be treated that way. We need to dispel doubts in this area once and for all.'
>
> Chris Grayling, Justice Secretary, 8 October 2012[1]

It is 1 a.m. Lying in bed, your consciousness dancing flirtatiously on the verge of sleep as your partner rumbles soothingly beside you, a loud thud jolts you awake. You shake yourself alert, ears pricked as your brain reboots and reprocesses. Was it a dream, or something real? Was it a *thud* as much as a *smash*? Was it outside in the street, or did the sound emanate from downstairs?

As you silently contemplate the answer to each question, your mind dives into a whirlpool of possibilities. Fighting to hold onto the most mundane – the children have gone and dropped a glass of water in the kitchen – you prod the silent figure next to you. No, they heard nothing. Go back to sleep.

Curiosity unsatisfied and heart rate climbing, you grab your dressing gown from the hook on the door and step onto the landing. Flicking the switch and drenching the first floor in light, everything appears still, but, when you poke your head into each bedroom in turn, concern steadily rises as you register the child-shaped lumps under the duvets.

BANG.

That one was unmistakeable. You run back to your bedroom – your partner heard it that time too. They are already clambering out of bed as you head instinctively to the wardrobe in search of something – anything – and alight on a small wooden coat hanger. Fear leaves no space to appreciate farce, and you seize it. Your

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partner follows you, mobile phone in hand, onto the landing and cautiously down the stairs.

The closer to the kitchen you move, the clearer the sound of drawers being roughly opened and shut. As your partner instinctively turns to run back upstairs to the children, they stumble. It's only a gentle clunk, but it's loud enough. The kitchen door springs open, and a man emerges. The first thing you see, and indeed the only thing you will remember when you retell this later, is that he is holding a baseball bat.

You'd always assumed that people describing such events as playing in slow motion were reciting a cliché. But every millisecond stretches in a way that confounds reality. The only thing right now that matters is your children. Your partner scrambles upwards on all fours, every step a mountain. When they eventually reach the summit, they glance back at the scene below, to the confrontation between you, wielding your flimsy coat hanger, and your better-equipped adversary. Only that's not what they see; instead, the coat hanger is on the floor and the bat has somehow been wrested from the intruder's gloved paws. You are now standing on the first stair, which affords you a slight height advantage, and you are raising the baseball bat in the air.

The crack as it crashes onto the burglar's skull is immediately followed by the thump of him collapsing to the floor. He does not move again. You don't remember the sequence of what happens next, only that you and your partner stare at each other, and then at the blood pooling around the prostrate figure on the floor, and then back at each other, and back and forth and back and forth, until someone, at some point, rushes to the children's rooms and someone calls 999.

After the police arrive and the intruder is stretchered by paramedics into the waiting ambulance, you sit in your living room, cradling an untouched cup of tea, and do your best to retell the events of the past twenty minutes, while your partner does likewise outside on the street. All you did, you both emphasise, was react instinctively in the heat of the moment. You didn't seek this confrontation; it smashed its way through your kitchen window and into the sanctity of your home. Faced with the unthinkable, one of you chose flight, one chose fight, but neither can be criticised, surely.

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Surely?

The notion that you would be blamed – much less *prosecuted* – for the injury caused to the armed man who invaded your house is as offensive as it is ludicrous.

Why is it, then, that, in many cases of this type, it is the innocent householder, rather than the marauding criminal, who ends up in front of the courts?

Consider Norfolk farmer Tony Martin, convicted and imprisoned in 2000 after shooting dead a teenage burglar who broke into his home. No wonder his cause was adopted across the country, with crowds gathering outside King's Lynn magistrates' court during his first appearance, to demand his release.[2] Following his conviction for murder (later reduced to manslaughter upon appeal, due to his psychiatric condition), he was described variously as a 'folk hero'[3] and a 'hero to victims of crime'.[4] Norman Brennan, director of the Victims of Crime Trust, criticised the verdict as a 'dangerous precedent', declaring, 'This is yet another example of how the criminal justice system can make criminals out of victims.'[5]

Politicians and journalists united in support. Upon his release from prison, Mr Martin was paid £125,000 for an exclusive interview by the *Mirror*, with the Press Complaints Commission ruling that the general prohibition on paying criminals for their stories could be avoided on the grounds that he had 'a unique insight into an issue of great public concern'.[6]

William Hague, as Leader of the Opposition, purported to speak for 'millions of law-abiding British people who no longer feel the state is on their side' when he pledged that a Conservative government would 'overhaul the law' to ensure 'the state will be on the side of people who protect their homes and their families against criminals'.[7]

If a television poll was to be believed, he was sowing on fertile political ground – in the aftermath of Tony Martin's conviction, 85 per cent of voters opined that the jury had reached the wrong verdict.[8] A leaked memo by Prime Minister Tony Blair later revealed his fears that, in refusing to be drawn into the public debate, he had created a perception of being 'out of touch with gut British instincts'.[9]

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This message – the law is weighted in favour of the burglar and against the Great British householder – survived and thrived throughout the next decade. It was oxygenated by the occasional tabloid flashpoint – such as the case of Munir Hussain, imprisoned along with his brother in 2008 for attacking an intruder with a cricket bat – and culminated in both Labour and the Conservatives promising changes to the law.

But even the change in the law that was duly delivered in 2012 was not enough to put the nation's minds at ease, as was demonstrated in 2018 when seventy-eight-year-old Richard Osborn-Brooks was arrested for stabbing to death a burglar in his kitchen. The 'hero pensioner'[10] feted by the *Sun* was the latest victim of laws which continue to pit 'a career criminal who sets out to deliberately burgle a house' against 'the terrified home owner who acts to protect himself and his home',[11] and come down, time and time again, against the latter.

Why is it the case, despite the best efforts of politicians, that an Englishman or woman cannot take reasonable steps to protect his or her castle? If we cannot defend ourselves and our loved ones in our own homes, how, it is reasonably asked, can we say our laws are working?

Before we return to our maligned heroes, Martin, Hussain and Osborn-Brooks, a good start would be to look at what the law actually says.

The law of self-defence

Question: What are we allowed to do in self-defence? Answer: Quite a lot, really.

The permitted use of force in self-defence has been established in the common law of England and Wales for centuries. In fact, as an historic example of Fake Law, legal textbooks used to demonstrate how freely one could slaughter burglars by citing a nineteenth-century case in which it was claimed, 'In 1811 Mr Purcell, of co. Cork, a septuagenarian, was knighted for killing four burglars with a carving knife.' The less exciting reality was that Mr Purcell used his leftover dinner knife to kill two – not four –

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burglars when they attacked him with swords and a firearm, and was apparently knighted before, not because of, this incident.[12]

The law isn't quite as generous to the householder as suggested in the retelling of Mr Purcell; however, at common law, claiming that you were defending yourself can afford you a 'complete defence' to a charge of violence, up to and including murder. This means that, if successful, the accused will be acquitted of all charges; a person could be killed and yet no crime will be found to have been committed.

English and Welsh criminal law distinguishes between 'complete' and 'partial' defences. A partial defence reduces culpability – and so the level of charge – but a criminal offence has still been committed. 'Diminished responsibility' is an example of a partial defence. This arises where a person who kills another is suffering from an 'abnormality of mental functioning' arising from a medical condition, which substantially impairs the person's ability to understand the nature of his conduct, form a rational judgment or exercise self-control, and which provides an explanation for the person's actions. In such circumstances, a defendant will have a partial defence to murder, and will instead be convicted of the less serious charge of manslaughter.[13] This, as it happens, was the defence that the Court of Appeal found ought to have applied in Tony Martin's case, after hearing expert evidence of a diagnosis of a paranoid personality disorder, and provided the reason for his conviction for murder being quashed in 2001 and substituted for manslaughter.[14]

Self-defence provides a complete defence because the law recognises that our right to physical security – indeed, our right to life – endows us with the right to defend ourselves from threatened harm. And it is not just in defence of oneself or another that a person is permitted to use force – the same principle applies to defence of property, or in the prevention of crime and the arrest or apprehension of offenders.[15] For shorthand, I shall refer simply to 'self-defence'.

The principles of the law of self-defence are relatively straightforward:

— A person acting in genuine self-defence is entitled to use such force as is reasonable in the circumstances as he

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believes them to be. This provides a defence to any charge of violence, up to and including the use of lethal force;

— The first question that a jury must ask is, did the defendant *believe* or may he have believed that it was *necessary* to use force to defend himself from an attack or imminent attack on himself or others or to protect property or prevent crime?

— The second question is, was the amount of force the defendant used *reasonable* in the circumstances, including the dangers as the defendant believed them to be?

— The burden is on the prosecution to *disprove* self-defence. It is not for a defendant to prove that he *was* acting in self-defence. The prosecution must prove beyond reasonable doubt (so that a jury is sure) that the defendant was *not* acting in reasonable self-defence.

The key concepts here are *necessary* and *reasonable*. It is worth briefly exploring these further.

'A genuine belief that force is necessary'

The question here is subjective – i.e. did the defendant genuinely believe he needed to use force in self-defence? It does not matter if the defendant was in fact mistaken, as long as he believed that at the time. So, if a six-foot man wearing a terrifying bear costume runs towards you brandishing what looks like a machete, and you genuinely believe he is about to inflict serious harm, the fact that you later realise the 'machete' is a hunny-pot and that you've KO'd Winnie the Pooh in front of a distraught crowd of Disneyland toddlers does not matter. The fact that your *belief* in the need for force was, by objective standards, unreasonable – who would mistake a hunny-pot for a machete, for Lord's sake? – does not matter at this stage. It might make the jury less likely to accept your insistence that your belief was genuine; however, the bottom line is that a mistaken, unreasonable but genuinely held belief in the need for force is enough. (An exception arises if your mistaken

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belief is due to your voluntary intoxication. Because, frankly, getting tanked on Stella and raining fury on Winnie the Pooh in a fountain is not something the courts can condone.)

Returning to our opening scenario, faced, in the dead of night, with an intruder standing a few feet away wielding a baseball bat, nobody could sensibly dispute that you genuinely and instinctively believed that force was necessary to protect yourself and your family.

‘Reasonable force’

Whether force is reasonable has to be judged by the circumstances *as the defendant believed them to be*, even if, as above, he was in fact mistaken. So, if you genuinely believe that a machete attack is imminent, what is reasonable has to be assessed by reference to that belief. What is reasonable will obviously depend on the individual case, but a principle often referred to in the case law is ‘proportionality’. If someone’s use of force was proportionate to the threat which they honestly perceived, it would usually follow that it was reasonable.

The law also recognises that, in the heat of a frightening confrontation, it is not always easy to gauge how much force you need to deploy to protect yourself, and a wide margin of appreciation is allowed. In the famous words of Lord Morris in the case of *Palmer*,[16] which are distilled in some form to juries when they are given their directions of law by the trial judge:

> If there has been an attack so that self-defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken.

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Other relevant principles include there being no 'duty to retreat', although the possibility of a defendant having been able to retreat is a factor to consider when assessing whether the use of force was necessary and reasonable.[17] It is also long established that a person may strike pre-emptively – you do not need to wait to be hit. Much of this may strike a non-lawyer as intuitively commonsensical. And they'd be right.

So, in our case, the fact that you could theoretically have run up the stairs after your partner instead of confronting the burglar does not make you guilty. Disarming the burglar and striking him once to the head, doing what you honestly and instinctively thought necessary in that split second to abate the threat posed to your safety, is something which a prosecutor would struggle to prove was unreasonable or disproportionate. Even if really serious injury – up to and including death – was caused by that blow, you are not expected to be able to 'weigh to a nicety' the precise force needed to incapacitate without injuring, given the terrifying position in which you find yourself.

Putting this all together, in a nutshell, the common law defence of self-defence means that the prosecution must make a jury sure that *either* a defendant didn't really believe he *needed* to use force, or that he did, but used *unreasonable* force – for example, he killed someone with a gun in response to a slap to the face – bearing in mind the broad scope of appreciation allowed in these cases.

So, if the law allows you to use lethal force in self-defence against burglars, as long as you genuinely believe it to be necessary and act reasonably in the circumstances as you perceive them, what happened in Tony Martin's case? How did he come to be convicted?

Tony Martin[18]

On the night of 20 August 1999, fifty-five-year-old Tony Martin was at home. He had lived alone for twenty years at the aptly named Bleak House, an isolated farm near Enneth Hungate, in Norfolk. Two convicted criminals, thirty-year-old Brendan Fearon and sixteen-year-old Fred Barras, approached the farmhouse in the dark. They broke a window to enter the breakfast room. Without

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warning, there followed a series of shots. Barras was shot in the back and legs, and Fearon was shot in both legs. Both managed to escape the property, although Barras collapsed and died a short distance from the house. Fearon made his way to a nearby premises and was subsequently arrested and taken to hospital.

Tony Martin told the police, and later the jury at his trial, that he had been woken by noises and had gone to the landing, where he saw a light coming from downstairs. Fearing for his safety, he retreated to his bedroom to fetch his twelve-bore Winchester pump-action shotgun. As he tentatively made his way downstairs towards the noises, a bright light was shone in his face, blinding him. Fearing for his life, he fired the gun three times, before returning to his bedroom. He waited for a while before emerging and searching the property. He could not see anybody and did not think that he had hit anyone when he fired his gun.

On that version of events, one might indeed wonder how a jury could have been satisfied that reasonable self-defence had been disproved. But it was, of course, only half the story.

The prosecution case was a little different. They said that Mr Martin had heard the burglars approaching the house and had readied himself so that, by the time they entered the breakfast room, he was already downstairs, fully dressed and with his shotgun loaded. He stepped out and shot them at least three times at short range, with the intention of killing them.

In the words of prosecuting counsel Rosamund Horwood-Smart QC, Mr Martin lay in wait and shot Barras and Fearon 'like rats in a trap'. 'This was a man,' she told the jury, 'who was prepared to be his own police force, investigating force, jury, judge and, if necessary, executioner.'[19]

Presented with the two conflicting accounts, the jury appeared to accept the prosecution's. And it is perhaps not hard to see why. Firearms experts proved that Mr Martin's claim that he had fired all the shots from the stairs was 'impossible'. A number had been fired from inside the breakfast room. The jury visited Bleak House and were able to assess the reconstruction of events for themselves. Barras' fatal wound was to his back, suggestive of a pursuit. Perhaps crucially, the jury also heard that Mr Martin had repeatedly told local Farm Watch meetings of his view that burglars should be shot. 'You know the best way to stop them –

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shoot the bastards.' He said that, if burglars came to his home, he would 'blow their heads off'. He also advocated putting such criminals in a field and using a machine gun on them.

These were not empty words. In 1994, Mr Martin had seen a man attempting to steal apples from his orchard and had fired at the rear of the man's vehicle as he drove away. As a result, his shotgun certificate was revoked. It follows that the firearm he used on 20 August was unlicensed.

Given this context, it is easier to see how a jury might have concluded that this was not a case of someone acting in reasonable self-defence, on any construction of the term.

And, indeed, once the full facts behind the press reports of other similar stories emerge, the sense of justified outrage starts to dissipate. The case of Munir Hussain, the 'have a go hero'[20] householder convicted and imprisoned in 2009 following an assault on a burglar, before having his sentence reduced on appeal, was variously reported as 'self-defence that went too far'.[21] Ross Clark, writing in the *Daily Express*, condemned the prosecution of Mr Hussain and his brother, Tokeer, 'all because he took action to protect his family from violent thugs who were threatening to kill them'.[22] Shadow Home Secretary Chris Grayling reacted to the case by pledging to 'change the rules' so that anyone 'acting reasonably' to stop a crime or apprehend a criminal 'could not be arrested',[23] in a baffling shuffle of horses and carts.

But, as the Court of Appeal was at pains to point out, while there was extreme provocation, which informed the decision of the Court of Appeal to suspend Munir Hussain's sentence of imprisonment, 'This is not, and should not be seen as, a case about the level of violence which a householder may lawfully and justifiably use on a burglar . . . The burglary was over. No one was in any danger. The purpose of the appellants' violence was revenge . . . It was a sustained attack with weapons. The pleas of the eyewitnesses to desist were ignored. Such violence is not lawful. No one at the trial suggested that it was.'[24]

While no doubt a terrifying ordeal for Mr Hussain, in which three men wearing balaclavas and armed with knives and cable ties forced their way into his house and threatened his wife and children, this was not a case of self-defence. It was not akin to you being confronted by a burglar on the stairs; rather, it involved

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rounding up a large group of men to embark upon a vigilante hunt for the burglar and, when they found him, attacking him with weapons until he suffered serious brain injury. What's more, at Mr Hussain's trial, he didn't even try to suggest that it *was* lawful self-defence; instead, he claimed that he was not part of the group administering the beating.

As with Tony Martin, the claim that Munir Hussain's conviction was an example of restrictive self-defence laws not working was baseless. In fact, the available evidence indicated that, despite what the headlines suggested, the law was being applied fairly and appropriately. In 2012, the Crown Prosecution Service conducted an 'informal trawl', which showed that between 1990 and 2005 there were only eleven prosecutions of people who had used force against intruders on private premises, and only seven of these related to domestic burglaries.[25]

As part of the same exercise, the CPS offered a series of example cases to illustrate how it was approaching charging decisions. In Derbyshire, a householder returned home to find an intruder; there followed a struggle in which the burglar hit his head on the driveway and died. In Lincolnshire, two burglars entered a house armed with a knife and threatened a woman; her husband overpowered one of the burglars and stabbed him to death. And, to return to our opening example, a householder in Lancashire disarmed a burglar carrying a baseball bat and used it to strike him on the head, fracturing his skull. In none of these cases was the householder prosecuted.

Cases where the CPS did decide to prosecute included that of a man in South Wales who approached a group of people trespassing on his land to engage in some night-time fishing. He threatened them with a shotgun and they duly ran away. As they did, the landowner fired forty shotgun pellets into one man's back. Likewise, a prosecution followed in Cheshire when the owner of a commercial premises caught a burglar, tied him up, assaulted him and then set fire to him.

Put simply, there is no evidence whatsoever to support the notion that there has been a rash of prosecutions – let alone convictions – of householders acting reasonably, as any of us might, when confronted by a burglar. The stories that trouble the bulletins – such as that of Andy and Tracey Ferrie, who in 2012

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were arrested on suspicion of inflicting grievous bodily harm after firing a shotgun at intruders at their home at Welby Farm in Leicestershire – invariably conclude prosaically, with a careful investigation and review of the evidence resulting in a decision not to charge.[26] Moreover, where prosecutions are initiated, they tend to be against the surviving burglars, who can expect little sympathy from the courts. The recipients of summary justice at the barrel of Andy Ferrie's shotgun attempted to rely upon the injuries they had received as mitigation when being sentenced for the burglary, only to be told by an irate His Honour Judge Pert QC, 'Being shot is not mitigation. If you burgle a house in the country where the householder owns a legally held shotgun, that is the chance you take. You cannot come to court and ask for a lighter sentence because of it.'[27]

And on the rare occasions where householders are charged, the high standard of proof – requiring the prosecution to make the jury *sure* that the householder wasn't acting in reasonable self-defence – means that any doubt must be exercised in their favour. In 2015, in echoes of Tony Martin, an eighty-year-old farmer shot and injured a convicted burglar, whom he suspected of trying to steal diesel on his land, and was charged with inflicting grievous bodily harm. Kenneth Hugill told a jury at Hull Crown Court in 2017 that he had acted instinctively in selfdefence when firing a double-barrelled shotgun at a suspicious vehicle he saw on his land at two o'clock in the morning.[28] He was acquitted in twenty-four minutes.[29]

Nevertheless, in the late 2000s, as the prosecuting authorities and the courts quietly went about applying the law of self-defence fairly and sensibly, the breathy narrative of Englishmen being unable to defend their castles became fixed in the political psyche. Something Had To Be Done.

The first legislative intervention was Labour's revolutionary move in 2008 of copying and pasting the existing common law of self-defence into a statute. That is no exaggeration – an exercise of pure political conmanship, section 76 of the Criminal Justice and Immigration Act 2008 simply restated the basic principles we considered earlier, but allowed the government to proclaim that it

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had Done Something. Little wonder that, during the Bill's second reading in the House of Lords, Lord Thomas of Gresford mocked 'the cheery optimism of the Minister in opening this debate', observing, 'Not only is it the fifty-fourth Bill dealing with crime and criminal justice that has come before us in the past ten and a half years, but it perpetuates muddled thinking, a lack of understanding of the fundamental legal principles that lie behind the British concept of justice, and populist but meaningless gestures towards the red tops' concerns of the day. Rhetoric and vote-catching matter more than practicality and principle.'[30]

The Conservatives, having quite rightly derided Labour's non-solution, once in government demonstrated an impressive talent for idiot one-upmanship by vowing to 'dispel doubts' where none existed. Seeking to make good on their vacuous manifesto pledge in 2010 to 'give householders greater legal protection if they have to defend themselves from intruders',[31] David Cameron and his ministers resolved to terrify citizens with ghost stories rather than honestly reassuring them that there was no monster lurking under the legal bed.

'When a burglar crosses your threshold,' Mr Cameron said, resuming his theme in 2012, 'we should worry less about their rights and more about the rights of the householder',[32] although he did not offer any actual examples of this alleged deference to 'burglars' rights' thwarting justice. He spoke of his – no doubt genuine – distress at being the victim of a burglary,[33] but not, as might perhaps have been more pertinent to the discussion at hand, of any experience of being persecuted for reasonable action he had taken against the perpetrators.

Justice Secretary Chris Grayling duly vowed to protect those who 'in the heat of the moment use force that is reasonable in the circumstances, but in the cold light of day seems disproportionate',[34] overlooking that the law already allows force that is reasonable, and that the jury's assessment of the reasonableness and proportionality of the force used is by reference to the circumstances *as the householder genuinely believed them to be*.

The change in the law that followed was about as sensible as one might expect from ministers apparently wholly unacquainted with legal reality.

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On 7 October 2012, Chris Grayling announced to rapturous applause at the Conservative Party conference that he was 'strengthening the current law'.[35] His big plan? To allow the use of 'disproportionate force' against burglars. Cue the triumphant trumpet blasts of the tabloids[36] cheering what the government had briefed as the 'Batter a Burglar' law.[37]

When codifying the common law in 2008, Parliament had specified the long-standing (and rather obvious) principle that force which was 'disproportionate' was not capable of being 'reasonable'.[38] If I kick you in the shin, you gouging out my eye is disproportionate, and thus will mean your claim to be acting in reasonable self-defence will not succeed.

But, for the first time in English and Welsh criminal legal history, Mr Grayling wanted to allow the use of 'disproportionate force' between citizens. By amending the legislation, he undertook to introduce a new, undefined concept of 'grossly disproportionate' force. As David Cameron told ITV News, 'People need the certainty to know that unless they did something grossly disproportionate, as we're going to put it, then they are basically in the right.'[39]

In a 'householder case', the law of self-defence would be amended to ensure that only householders using *grossly disproportionate* force against intruders would be acting beyond the scope of reasonable self-defence. Merely *disproportionate* force, it followed, would be permitted, even celebrated. 'We're saying "you can do anything as long as it's not grossly disproportionate",' the Prime Minister beamed, while the front page of the *Sun* cheered its support: 'Homeowners who "bash a burglar" – even if they shoot or stab one in the heat of the moment – will escape prosecution.'[40] 'This,' declared Chris Grayling with something proximate to the Oxford English Dictionary definition of hubris, 'should finally lay the issue to rest once and for all.'[41]

Needless to say, it didn't. For one, Parliament didn't actually legislate what Messrs Grayling and Cameron had promised. When the High Court was called upon to interpret the new legislative provision,[42] it confirmed that its drafting *didn't* mean that, to borrow the statesmanlike words of the Prime Minister, 'you can do anything as long as it's not grossly disproportionate'. To the contrary, the legislation on its true construction still required that

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but, in the process, we found ourselves passengers on a runaway political mine train, gathering furious speed as it hyped and glorified the virtue of unrestrained violence.

This is not a paean to pacifism. There will, regrettably, always be a need, in certain circumstances, for the use of force. But that has to be subject to limits. For, while the scenario that the discourse invites you to imagine, much as I did at the start of the chapter, casts you in the role of Obviously Good Householder as against Obviously Bad Intruder, human interactions are not always so clear cut. There will be the youth in your garden, eyeing up your shed. There will be the youth in your garden, retrieving his football. There will be the youth just walking in your neighbourhood. Drawing distinctions and acting reasonably and proportionately in the circumstances is self-evidently vital to minimise irreversible, mistaken consequences, up to and including the loss of life.

Furthermore, what is lost in the political arms race to permit an ever-increasing quantum of violence against our fellow citizens is that laws of self-defence are carefully calibrated not only to protect you if you perceive yourself to be in danger, but to protect you if somebody else perceives that *you* pose a threat to *them*.

Few of us intend to be burglars. But many of us have had disagreements with strangers. Many of us have felt that sense of discomfort, bordering on threat, when confronted by somebody unknown to us, and the likelihood is that most of us, whether we appreciated it at the time or not, have made somebody else feel the same way. Many of our children will, at one time or another, have wandered onto somebody's private land.

The way in which the law permits people to react matters. The limits on what can be done by others to us, and to our children, matter. We would not want someone to use violence against us, or our children, unless they genuinely believed it was necessary. We would not want somebody to be licensed by the state to use unreasonable or disproportionate force against us. We rely on the law to protect us whether we are perceived as the hero or villain.

The very real danger, therefore, is that, when we don't understand how the law works and what it in fact permits, much less the rationale behind it, we can find our misunderstanding leading us astray. We can be charmed by the half-price snake oil of

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the Chris Graylings of this world swearing the virtues of inflicting disproportionate force on each other, and nod along as columnists and headline writers celebrate 'bashing' burglars.

And, even if Chris Grayling lacked the competence to actually change the law in the way that he promised, others have both motive and means. Tales from the United States are cautionary.

In 2005, following lobbying by the National Rifle Association,[47] the Florida state legislature enacted an amendment to its criminal code to introduce a so-called Stand Your Ground law. The architecture of Republican governor Jeb Bush and the former president of the National Rifle Association Marion Hammer,[48] section 776.012(2) of the Florida Statutes made explicit not only that deadly force can be used where a person reasonably believes it necessary to prevent death, serious bodily harm or the commission of a forcible felony, but that, 'A person who uses or threatens to use deadly force in accordance with this subsection **does not have a duty to retreat and has the right to stand his or her ground** if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.'

As we saw earlier, under English and Welsh law, there is no *duty* to retreat; however, the issue of whether a person could have retreated instead of using force is a factor to be considered in the overall assessment of the reasonableness of their conduct. Confronted with somebody in your home, for example, opportunities to retreat may be limited. Conversely, a person standing in the street and seeing an aggressive yahoo shouting threats from a hundred yards away may well, in the eyes of a jury, have a reasonable opportunity to remove themselves from the scene before it becomes a theatre of conflict. Under Stand Your Ground, you would have a legal right to remain where you are, notwithstanding that, in doing so, you may be inviting a confrontation and increasing the chances of a violent escalation. If violence is then thereby provoked, you are potentially entitled to deploy deadly force against the other person.

The obvious risks of this recalibration of self-defence were highlighted at the time of the bill's passage through the state legislature. Miami's chief of police, John F. Timoney, called the bill 'unnecessary and dangerous'. He said that children could become

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innocent victims and warned that gun owners might assume they have 'total immunity'. He added, 'Whether it's trick-or-treaters or kids playing in the yard of someone who doesn't want them there, or some drunk guy stumbling into the wrong house, you're encouraging people to possibly use deadly physical force where it shouldn't be used.'[49]

His fears were soon realised. Over the nine years that followed, at least twenty-six children or teenagers were killed in cases in which Stand Your Ground was cited.[50] These included a nine-year-old killed in the crossfire of a dispute in which a defendant unsuccessfully raised the Stand Your Ground defence. In another case, in West Palm Beach, an unarmed nineteen-year-old was killed after an argument about dog walking; Christopher Cote knocked on the door of his sixty-two-year-old neighbour, who answered the door armed with a shotgun, stepped outside and shot the young man dead.[51]

According to official statistics, the number of deaths in Florida caused by people acting in averred self-defence nearly tripled between 2005 and 2010, when compared to the five-year period immediately preceding the introduction of SYG, up from an average of twelve 'justified homicides' per year to thirty-five.[52] A study published by the *Journal of the American Medical Association* showed that the rate of homicides in Florida increased by 24.4 per cent between 2005 and 2014, and firearm-related homicide increased by 31.6 per cent. Not only was this over a period when the nationwide homicide rates were declining, but these trends were notably not present in comparator states which had not enacted SYG laws.[53]

Far from viewing the Florida experience as a cautionary tale, however, other – mostly Southern – states have followed suit since 2005 and brought forth their own equivalent of Stand Your Ground laws. As of 2018, a total of twenty-five states had a SYG dimension to their law of self-defence, according to the National Conference of State Legislatures.[54] While one must tread cautiously when purporting to identify causation in trends of violence, a study in the *Journal of Human Resources* in 2016 estimated that SYG laws contribute to 600 additional homicides per year.[55] Another study, published by the *European Journal of Law and Economics* in 2018,

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found that SYG laws had led to an increase in gun deaths in the central cities and suburbs of those states.[56]

Many of the problems, it has been suggested, lie not so much in the strict legal application of the Stand Your Ground laws, but in the way they are sold to the American people. As we have seen in England and Wales, what the law *actually* says about selfdefence is, to a large extent, irrelevant. The majority of the public, without the time, expertise or inclination to pore over the statute book, will hear only the mood music of Fake Law. The US media talks about *Stand Your Ground*, not *Stand Your Ground But Only Resort To Force Where You Reasonably Believe It Is Necessary*. Back in Blighty, we have *Batter A Burglar*, not *Use Reasonable Force Against A Burglar (Carefully Treading The Line Between The Somewhat Nebulous Concepts of Disproportionality and Gross Disproportionality)*. To the extent that the law has an impact on individual behaviour, it is our *understanding* that matters.

If the state is understood to be encouraging citizens to be readier to resort to violence – whether by belligerently inviting confrontation or by condoning the use of disproportionate force – some receptive listeners will take the state at its word. They will shoot first and shoot often. A commentary piece by Mark Hoekstra for Reuters[57] raised the obvious question: would many of these lethal confrontations have happened at all, if there had not been a celebrated Stand Your Ground law? Would the men firing the shots have felt less emboldened had they not been subjected to a noisy soundtrack of macho, NRA-sponsored Stand Your Ground rhetoric? Is the real problem the culture that the law and its presentation fuels, rather than its strict text?

Before I return to the troubling discourse on our own shores, I would offer one final story from the United States. In September 2018, twenty-six-year-old Botham Jean was at home in his apartment in Dallas, Texas, where Stand Your Ground laws reign. Amber Guyger, a police officer who lived in the same block, walked into Mr Jean's flat in error. Not realising her mistake, and wrongly assuming him to be an intruder in her home, she drew her gun and shot him dead.[58]

While we, fortunately, are yet to share the American experience, we should not be so naive as to assume we are immune. When a prime minister tells the British public, 'When that burglar crosses

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your threshold . . . they give up their rights,'[59] he is not only misstating the law, but inciting a mindset where reacting to perceived threats with violence is a first, not a final, recourse.

The dominant narrative Tippexes out the nuance. Burglars, or suspected burglars, are bad. Any rights – including the right to life – are left at the point of entry. Disproportionate force is no less than they deserve. The limitations on your right to kill are causing unnecessary doubt. Trust us to dispel that for you. Just ignore the small print pointing out that this inevitably means dispelling limitations on other people's right to kill *you*.

In a paradigm where householder rights are perceived to be absolute, the right to protect life can quickly tip into a right to take life. And this matters as a tenet of basic humanity. We shouldn't take life without good reason. It matters because, without conditions on our use of force, even in situations of unimaginable terror and threat, we are marching under the flag of vigilantism. Even where we are correct in our assessment that a person poses a threat, that cannot be the end of the inquiry. Some intruders will have the shameful, unsympathetic CV of Brendan Fearon, burglar of Martin's Bleak House, but some will be children making their first stupid mistake. We see those children in the criminal courts every day of the week. And we hope that their first mistake will be their last because of their rehabilitation, not because of a Tony Martin figure inflicting their own brand of summary justice.

Our national rhetoric recently tiptoed even further towards the brink. The case of Richard Osborn-Brooks, a seventy-eight-year-old who stabbed a burglar to death using a screwdriver, occupied enraged headlines for several weeks in April 2018. He was arrested and interviewed under caution – an entirely unremarkable and expected outcome when police attend your home to find that you have killed someone in your kitchen – before the police investigation concluded that no further action should be taken against him. But, as long as fulmination sold copies and made for delectable quotables for the constituency newsletter, editors and politicians joined hands for a pious, mendacious chorus of 'Isn't the law dreadful? An Englishman's home should be his castle.' The

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The symptoms were severe. Progressive respiratory failure meant that Charlie was dependent on a ventilator to keep him alive. He was unable to move his limbs, nor could he open his eyes enough to be able to see. He was persistently encephalopathic – there were no usual signs of normal brain activities such as responsiveness, interaction or crying. He was also deaf, and was affected by frequent seizures. The clinical consensus was that his quality of life was so poor and his condition so devastating that Charlie would derive no benefit from continued life. Accordingly, Great Ormond Street Hospital applied for a court order declaring that it was lawful for artificial ventilation to be withdrawn and substituted for palliative care – a court order, in effect, that Charlie should die.

There was, however, another option: a pioneering treatment, known as nucleoside therapy, was available in the United States. Charlie's parents traced a doctor, who said that, subject to funding, he would be prepared to treat Charlie in the US. Charlie's desperate parents appealed to the public for funds, and, with the help of social media and crowdfunding, raised £1.2 million to pay for nucleoside therapy, to take place in America.[4]

But when the case came before the High Court in March and April 2017, the judge hearing the case, Mr Justice Francis, refused to allow the pioneering treatment to take place, ruling instead that, in his judgement, Charlie should have his ventilation withdrawn.

There followed over the next few months a series of appeals through the hierarchy of the English and Welsh courts, with the Court of Appeal and the Supreme Court upholding the decision of the High Court. When those appeals failed, submissions were made to the European Court of Human Rights (ECtHR), whose judges similarly refused to step in to save Charlie's life.

Matters soon went global. The ECtHR decision attracted the attention of the American media, with the Breitbart website condemning the 'EU court' for supporting the decision of the British 'death panel'.[5] On the evening of 2 July 2017, following protests outside Buckingham Palace, the Vatican released a statement, in which Pope Francis announced that he was following Charlie's case 'with affection and sadness'. Speaking of Charlie's parents, the statement said, 'For this [the Pope] prays that their

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wish to accompany and treat their child until the end isn't neglected.' Within hours, US President Donald Trump tweeted, 'If we can help little #CharlieGard, as per [sic] our friends in the U.K. and the Pope, we would be delighted to do so.'[6] Within a day, the Vatican's hospital, Ospedale Pediatrico Bambino Gesù, offered to admit Charlie so as to prevent his ventilation being switched off. This offer was endorsed, and its acceptance urged, by the Italian Foreign Minister Angelino Alfano during a telephone call with UK Foreign Secretary Boris Johnson.[7] This conversation was reported on the same day that thirty-seven Members of the European Parliament published an open letter to the UK Prime Minister and Secretary of State for Health, condemning the 'outrageous outcome of Charlie's case', which it was said 'infringes Europe's most fundamental values, particularly the right to life, the right to human dignity and personal integrity'.[8]

Fox News told its American audience that Charlie had been 'sentenced to death by the British government',[9] while Breitbart warned that the courts' decisions were the inevitable corollary of 'single-payer, government-run health care'.[10] The *Austin American-Statesman* advised readers that 'European bureaucrats made the callous decision that it would not be cost effective to spend money on [Charlie], even in the face of possible treatment.'[11]

Fox News commentators excoriated the judge's 'cynical decision' to rule in favour of a 'state-run National Health Service [which is] always looking for ways to cut costs', reaching variously for parallels with Ebenezer Scrooge's entreaty to 'decrease the surplus population' and, inevitably, the Nazis, warning that the UK was teetering on the precipice of a 'full embrace of eugenics'.[12] The Speaker of the US House of Representatives, Paul Ryan, tweeted: 'I stand with #CharlieGard & his parents. Health care should be between patients & doctors – govt has no place in the life or death business.'[13]

Back at home, crowds of protestors from all over the world began to gather outside the Royal Courts of Justice on London's Strand, their chants of 'Medicine, not murder', 'Shame on you, GOSH [Great Ormond Street Hospital]' and 'Shame on you, judge' an audible, sombre percussive to the proceedings inside.

Appalled by the British refusal to grant Charlie 'the medical treatment he needs', the appropriations committee of the US

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House of Representatives passed an amendment on 19 July entitling Charlie to 'permanent residence' in America, only to be thwarted by the British court's refusal to allow his release.[14]

Protestors took the fight to the hospital itself, amassing at Great Ormond Street and urging the families of other patients to sign their petitions and join the campaign. The hospital responded by calling in the police.[15]

Eventually, on 24 July, after a series of further medical tests, the High Court handed down its final judgment, upholding its original declaration that palliative care should begin.[16] The decision was condemned by British politicians – with occasional UKIP leader Nigel Farage tweeting that the 'establishment closed ranks' on Charlie Gard's parents and 'took away their rights'[17] – and in America, with Texas Senator Ted Cruz among the many asking, 'WHY govt should have power to decide who lives & dies?'[18]

On 28 July 2017, Charlie passed away in a hospice. The doctors and the courts had got their wish. A child's life had ended, when, in the words of Charlie's mother, 'Had Charlie been given the treatment sooner he would have had the potential to be a normal, healthy little boy.'[19]

If the watching world had been shaken by the matter-of-fact way in which the UK establishment had ordered a child to die, it did not have to wait long for a second quake. **Alfie Evans**[20] was born on 9 May 2016, the first child of Tom Evans and Kate James. From two months of age, signs of developmental delay began to appear, and he then started to lose many of the abilities he had developed in his first months of life. At the age of six months, a series of tests showed that the delay was significant, although no specific disorder could be identified. In December 2016, Alfie was admitted to Alder Hey Children's Hospital. By February 2018, the medical consensus was that Alfie had a progressive, ultimately fatal neurodegenerative condition, most likely a mitochondrial disorder, which was both catastrophic and untreatable. There was no chance of any recovery. Alfie could not breathe or swallow unaided, and the view of the clinicians at Alder Hey Children's Hospital was that his quality of life was poor. Accordingly, in December 2017, the hospital applied to the High Court for a declaration that artificial ventilation should be withdrawn.

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The sense of déjà vu does not end there. For, while Alder Hey may have felt unable to offer treatment, one medical establishment was willing and able: the Bambino Gesù in Rome, the same facility that had extended an offer to Charlie Gard. In February 2018, over several hearings at the High Court, Alfie's unrepresented parents cross-examined the medical experts and pleaded with Mr Justice Hayden to refuse Alder Hey's application and allow Alfie to travel by air to Rome for treatment.

Again, however, the High Court ruled that ventilation should be withdrawn. And again, despite arguing their case through to the Supreme Court and beyond, to the European Court of Human Rights, they were met with layers of judicial and medical resistance, notwithstanding the mounting public support in favour of keeping Alfie alive.

On 11 April 2018, after Mr Justice Hayden approved an end-of-life care plan, these supporters, like Charlie's Army before them, congregated outside the hospital, chanting Alfie's name and singing the Mariah Carey ballad, 'Hero'. They were addressed by Tom Evans, who held aloft three passports – his, Kate James' and Alfie's – as his legal representatives explained to reporters that Mr Evans had the legal right to remove his son from the hospital. Alfie, it was said, was being falsely imprisoned: 'the NHS has broken Alfie's ancient rights under habeas corpus – a 13th century legal safeguard that prevents unlawful detention.'[21]

An appeal on Facebook saw Alfie's Army grow over the days that followed, as the fresh legal challenge proceeded to court.

Protestors bearing balloons, posters, placards and teddy bears accumulated outside Alder Hey as the petition to save his life attracted close to quarter of a million signatures.[22] The family's local MEP, Steven Woolfe, a qualified barrister, told the media that 'Alder Hey is more concerned with saving face than saving a young child's life'.[23]

Mr Woolfe also evoked the 2014 case of Ashya King, a five-year-old boy with brain cancer whose parents defied NHS doctors and took him to Prague for proton-beam therapy, sparking an international manhunt. The parents were arrested, but ultimately Ashya was permitted to have the treatment in Prague, and it was a success. Speaking about Alfie, Mr Woolfe told daytime-TV show *Good Morning Britain*, 'The same applied with the Charlie Gard

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scenario, the same applied with Ashya King . . . We now know with Ashya King, who lived, that our professionals make mistakes.'[24]

On 15 April, the Pope once more took an interest, referring to Alfie in his Sunday prayers,[25] and, after the Court of Appeal rejected the latest appeal on 16 April, granted Tom Evans a personal audience. This was followed by Pope Francis offering his explicit support for the parents' cause, tweeting a few days later: 'I renew my appeal that the suffering of [Alfie's] parents may be heard and their desire to seek new forms of treatment may be granted.'[26]

That same day, as the European Court of Human Rights knocked back a second attempt at appealing, 200 protestors attempted to storm Alder Hey Children's Hospital, only thwarted by the lines of police officers providing state-backed muscle.

Tom Evans proceeded to initiate a private prosecution against three of Alfie's doctors, eagerly reported across the world, including by the *Daily Mail*, which asked its readers, 'Could medics face trial for conspiracy to murder?'[27] The threats, abuse and intimidation towards hospital staff that ensued were perhaps predictable.[28]

Meanwhile, in further echoes of Charlie Gard, foreign citizenship was conferred on baby Alfie – this time by the Italian Ministry of Foreign Affairs – in an effort to remove him from the jurisdiction of the murderous English and Welsh courts. The American political and media interest peaked during the final days of the legal process, in late April 2018. On 25 April, as the Court of Appeal closed the doors on the final chance of moving Alfie to Rome, a vigil was organised outside the British Embassy in Washington DC, with politicians clamouring to offer support.[29]

Nigel Farage once more provided the legal translation for US viewers, assuring Americans that, 'there is treatment available in Italy that is not available here', and nodding as the Fox News anchor suggested that Alfie was a 'hostage of the National Health Service' and that 'part of [the problem] is the NHS, they don't want to risk the fact he goes over to Italy, he gets treatment, he has some quality of life and that's a big embarrassment'.[30]

In the early hours of 28 April 2018, at twenty-three months old, Alfie died at Alder Hey. An angel had gained his wings. The state had, once more, got its way. The public mood in both cases was

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footing as a relevant consideration in custody disputes by the Guardianship of Infants Act, and gradually the balance tipped. In the twentieth century, the welfare of the child began to supplant matrimonial conduct as the deciding factor in matrimonial disputes, and the Guardianship of Infants Act 1925 not only gave mothers and fathers statutory equality in custody wrangles, but elevated the 'welfare of the child' to the 'first and paramount consideration'.

This idea, that the welfare of the child was not just *a* consideration, but *the* consideration for courts dealing with cases involving children, is what underpins our legal system today, expressed in section 1 of the Children Act 1989: when a court determines any question relating to the upbringing of a child, 'the child's welfare shall be the court's paramount consideration'.

The notion of 'welfare' is often expressed as 'best interests', which is the language used in Article 3 of the United Nations Convention on the Rights of the Child. In legal systems across the world, the absolute rights of the father have given way to the individual rights of the child.

The difficulty that can arise is that, for many children, it is hard if not impossible for them to express or enforce those rights, or to identify or take decisions in their own interests. Most of the time this is not an issue, as parents and guardians tend to agree how to raise their child, and do so, by default, with their best interests at heart. But where there is a dispute – between two parents, or between the parents and the state, or between parents and doctors – as to what is in a child's best interests, the courts can be invited to decide.

Why might the state intervene in my child's life?

In practice, the types of case in which the courts are called upon to apply the welfare principle broadly fall into two camps – public law and private law. **Public law** cases involve the state seeking to enter uninvited into the lives of a child and her family in the name of child protection. Where the state – usually a local authority – considers a child to be suffering, or at risk of suffering, 'significant harm',[35] it can apply to the court for various orders. Two of the

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