

CAN LAW ACHIEVE HAPPINESS? CRITICAL REFLECTIONS ON CRIMINAL JUSTICE

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INTRODUCTION

This paper applies Bentham's utilitarian philosophy to contemporary criminal law in the United Kingdom. This task necessarily requires that I begin by addressing Bentham's assumptions about the role of the legislator and of law which are central to his argument that law can achieve happiness. Section (ii) applies Bentham's ideas to contemporary legislation on domestic violence and it examines how the police and courts implement this legislation. I seek to understand whether Bentham's arguments apply to contemporary legislators and the legal process. Section (iii) looks at a domestic violence case heard in a London magistrates' court in 2017. I assess the evidence submitted in this case and consider whether the decision reached by the court can be adequately 'summed up', to use Bentham's phrase, as one which advances 'the happiness of society'?

Law and Bentham's Utilitarian Calculus

Bentham, like his predecessor Locke, struggled to define the proper relation between citizens and the sovereign/state. He approached this issue by setting out a principle that could help legislators create an appropriate body of law to guide human behaviour. His ideas were strongly influenced by the politics of his age. Thus whereas Locke emphasised the importance of the social contract between individuals (which was overseen by the state), Bentham rejected 'contracts' and 'natural rights' as 'fictions' and instead sought to ground his theory in psychology and ethics. For Bentham, reason was not the principle factor guiding human behaviour, which meant that legislators and the sovereign needed to have a clear understanding of how individual behaviour could be regulated by laws that would maximize

the sum total of happiness in society without unduly restricting individual liberty which he perceived as ‘freedom from external restraint or compulsion’.

I acknowledge from the outset that Bentham was not concerned with addressing what today we term ‘the administration of justice’. Indeed while he qualified at Lincoln’s Inn, he never practiced law. His sought instead to identify general philosophical principles which he derived from psychology and which took the form of a hedonistic calculation based on maximising the sensation of pleasure and minimizing pain.¹ Bentham believed that pleasure and pain determine human behaviour, both right and wrong, and it informed the choices individuals make (including their conception of happiness).

In his *Introduction to the Principles of Morals and Legislation*, Bentham sought to link his utilitarian philosophy to the task which legislators should use to draft laws that would create sufficient rewards and punishments to encourage/discourage particular types of behaviour.² Specifically legislators should adopt laws that would influence behaviour in such a way as to maximise social welfare. For Bentham this was to be accomplished via the development of a body of comprehensive law which, rationally arrived at and properly conceived, would be administered by a magistrate to punish and deter those who offend the law. In this sense political sanction, rationally designed and correctly applied, was intended to reinforce popular and religious sanctions to instruct the public in proper social conduct.

While Bentham argued for the radical reform of law and for representative government, Sweet observed the existence of a contradictory position in Bentham’s thought between the importance of liberty and the potential role of law:

Law, which is by its very nature a restriction of liberty and painful to those whose freedom is restricted, is a *prima facie* evil. It is only so far as control by the state is limited that the individual is free. Law is, Bentham recognized, necessary to social order and good laws are clearly essential to good government. Indeed, perhaps more than Locke, Bentham saw the positive role to be played by law and government, particularly in achieving community well-being. To the extent that law advances and

¹ Schofield, P (2009) *Bentham – A Guide to the Perplexed*. Continuum: New York.

² Bentham. J (1999) [1781] *An Introduction to the Principles of Morals and Legislation*. Kitchener, Ontario: Batoche.

protects one's economic and personal goods and that what government exists is self-government, law reflects the interests of the individual.³

This tension is evident in my analysis of criminal law. While there are many questions that could be asked about Bentham's approach to law and legislation, this paper explores two issues. First I look at how contemporary legislators have considered the issue of domestic violence and I look at their attempt to legislate against it. Can it be said that this legislation is rational, reasonable and that its application will achieve 'happiness'? Second, by examining a specific criminal case I argue that it is possible to see how contemporary magistrates apply the law. In Bentham's view, magistrates played a fundamental role in implementing law and educating the public about acceptable social behaviour. Is this the way that law actually works? Is it possible to sum up the balance of pleasure and pain reached in a criminal case? Did the magistrate's decision in this case achieve a just and proportional outcome? Rephrasing the question in Bentham's terms, I ask whether the magistrate's decision achieved a balance between majority and minority happiness.

Contemporary Legislators, Legislation and Criminal Justice

While domestic violence has been considered by British courts since at least the seventeenth century, the way in which it has been conceived and dealt with by government and the courts reflects the dominant social views and attitudes of the day.⁴ Thus for the period between the 17th and the mid-19th century public attitudes only slowly came to perceive that 'a husband's physical correction of his wife' was something that the courts should deal with. A key problem throughout this period was to define the nature and significance of the 'violence' used by husbands against their wives and whether violence should be subject to legal sanction. Among the many 'moral' issues linked to the issue of domestic violence during this period were the nature of the marital contract (and the right to civil divorce), reproductive rights (i.e. abortion), the age of consent, the right to corporal punishment (including rape in marriage), inheritance laws and ultimately gender equality.

³ Sweet, W. n.d. 'Jeremy Bentham (1748—1832)', *International Encyclopaedia of Philosophy. Sec, 5 At*: <<http://www.iep.utm.edu/bentham/>>.

⁴ Foyster, E (2006) *Marital Violence: An English Family History, 1660-1857*. Cambridge: University Press.

Throughout this period we see two other processes occurring in English law, namely an increasing focus on contracts and changing ideas about ‘the person’ (i.e. the concept of ‘the individual’) as the bearer of ‘a unique and natural self’ who is subject to the law.⁵ For example, in addressing the demands of women for equality the courts have increasingly been compelled to address and revise women’s access to education, property, wages, the right to vote etc. all of which had previously been denied women on the basis that their difference from men was found in nature and was not socially produced. On this basis their claims could not be addressed by the law. As women came to be perceived as rights-bearing individuals the privileges of men and of the political elite were increasingly restricted and redefined until a point was reached at which formal equality before the law between men and women was reached (even though substantial socio-economic inequalities prevailed). The end result is that the courts have become increasingly involved in defining rights. In short, the state and the law have assumed a greater role in regulating contemporary social life and individual liberty.

Legislation against domestic violence illustrates this chequered, back and forth process well. The first official guidance was issued by the Home Office in 1986 which outlined the role and responsibility of the police to protect women and children from ‘violence in the home’ (officers were supposed to have been trained to recognize domestic violence).⁶ In 1996 Government adopted the *Family Law Act* which simplified and strengthened the availability of non-molestation orders and occupation orders. Even so criticism of ineffective policing of domestic violence continued to grow.

The issue was debated in the House of Commons when it discussed the initial draft of the *Domestic Violence, Crime and Criminal Act 2004*.⁷ While the Act introduced important new protections,⁸ no definition of ‘domestic violence’ was agreed upon or incorporated into

⁵ Collier, J., Maurer, B. & L. Suraez-Navez (1995) ‘Sanctioned Identities: Legal Constructions of Modern Personhood’, 1 *Identities* 27 at 5.

⁶ Police Foundation (2014) *The Briefing – Policing Domestic Abuse*. The Police Foundation. London. Available at: <http://www.police-foundation.org.uk/uploads/holding/projects/policing_domestic_abuse.pdf>.

⁷ See: <<http://www.legislation.gov.uk/ukpga/2004/28/contents>>.

⁸ Specifically: (a) a new offence of ‘causing or allowing the death of a child or vulnerable adult’, (b) common assault was made an ‘arrestable offence’; (c) co-habiting same sex couples and couples who have never co-habited or been married were eligible to seek non-

the act because legislators left it to different government agencies to agree a single definition and because they believed that it ‘would be difficult for any statutory definition to reflect the breadth of domestic violence and to keep it up to date.’⁹ To date the government has yet to formulate a definition of domestic violence or domestic abuse, though there is a ‘cross government’ (working) definition which is: ‘any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality’.¹⁰

According to this approach, abuse may encompass, but is not limited to, a psychological, physical, sexual, financial and emotional element. This understanding extends to ‘controlling behaviour’ and ‘coercive behaviour’, including forced marriage (which are legally defined). Currently individuals accused of domestic violence/abuse (DV) can be prosecuted under any one of 64 different offences.¹¹ Indeed, the failure to agree a definition means that statutory agencies have not adopted a standard approach towards arresting, charging or prosecuting individuals which, in turn, means that official statistics cannot be used to monitor and report outcomes (i.e. there are no statistics on conviction etc.). What is more, despite a 2011 government statement that it would draft appropriate legislation and support services for those affected by DV, this has not happened.¹² Indeed it is widely accepted that the criminal justice system fails to hold perpetrators of DV to account.¹³

In short, despite an awareness that domestic violence affected 1.2 million females and 650,00 males, the government has yet to consider all the evidence or draft legislation on an

molestation orders; (d) breaches of non-molestation orders were made a criminal offence; and (e) courts were allowed to impose restriction orders on those convicted of any offence.

⁹ See: Baroness Scotland, Hansard, December 15, 2003 column 1015.

¹⁰ UK (2016) 2016-20 Strategy to End Violence Against Women and Girls. Home Office. London. Available at: <<https://www.gov.uk/government/publications/strategy-to-end-violence-against-women-and-girls-2016-to-2020>>.

¹¹ UK (2015) Controlling or Coercive Behaviour in an Intimate or Family Relationship. Statutory Guidance Framework. Home Office. December. Available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf#page=17>.

¹² See: <<https://www.gov.uk/government/speeches/theresa-may-consultation-on-the-cross-government-definition-of-domestic-violence>>.

¹³ UK (United Kingdom) (2014) AAPG Inquiry into Women’s Access to Justice. London. Available at: <https://1q7dqy2unor827bjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2015/11/APPG_womens-access-to-justice2.pdf>.

issue that has been in the headlines for many decades. In 2016 government published the ‘2016-20 Strategy to End Violence against Women and Girls’ which promised to allocate significant funding for support services and to draft new legislation.¹⁴ This act – The Domestic Violence and Abuse Act – would, if accepted into law, establish a Domestic Violence and Abuse Commissioner, define domestic abuse, create protection orders and allow for aggravated sentences to be used where abusive behaviour involves a child.¹⁵ The proposed Act would substantially enlarge the scope for legal action by criminalizing many types of behaviour. It promises to commit upwards of \$100 million to prevent domestic violence, a cost that is partly justified on the basis that costs associated with violence against women and girls is estimated at £20 billion annually.

A noticeable omission from the proposed Act is the absence of attention to and support for domestic abuse by women against men and violence between same sex partners. Indeed the proposal shows all the signs of being hastily drawn up in the absence of careful consideration of a range of issues revealed by research, an understanding of how the courts work and of international law and jurisprudence.¹⁶ For instance national statistics suggest that the number of DV ‘victims of violence’ has stabilized at just over two million since 2008/9.¹⁷ However, though the number of DV cases referred by the police to the Crown Prosecution Service (CPS) has increased from 80,000 in 2009/10 to 120,000 in 2015/16, it is not clear what happened to the large number of cases which do not appear to have been referred to court. In addition, the CPS prosecutes about 70% of all the cases referred to it and, on average, it succeeds in getting a conviction in just over 70% of these cases. There are, therefore, questions about how the police and the CPS handle and prosecute DV cases. The call to increase the number of prosecutions for DV comes at a time when budget allocations to the police, the courts, local authorities, women’s refuges and prevention and treatment

¹⁴ UK (2016) 2016-20 Strategy to End Violence Against Women and Girls. Home Office. London. Available at: <<https://www.gov.uk/government/publications/strategy-to-end-violence-against-women-and-girls-2016-to-2020>>.

¹⁵ UK (2017) *Domestic Violence in England and Wales*. Briefing Paper no. 6337. June. House of Commons Library.

¹⁶ Notably the Committee on the Elimination of Discrimination against Women and the UN. See: United Nations (2010) *Handbook for Legislation for Violence Against Women*. Department for Economic and Social Affairs, Division for the Advancement of Women. New York.

¹⁷ UK (2017) *Domestic Violence in England and Wales*. Briefing Paper no. 6337. June. House of Commons Library.

programmes have been drastically cut.¹⁸ Worryingly governments are willing to pass new laws/legislation while simultaneously cutting the budgets of departments which are expected to enforce the law. For instance, ‘between 1989 and 2009, Parliament approved over 100 Criminal Justice Bills and more than 4,000 criminal offences’.¹⁹

How do the police and the CPS prosecute DV cases? While the police have responsibility for assessing reported incidents of domestic violence, there is clearly considerable discretion exercised by officers as to whether they will record an incident, charge a suspect, investigate, issue a caution, decide to drop a case or decide whether to prosecute by passing the case to the Crown Prosecution Service (CPS).²⁰ Official statistics make it clear that there are marked regional variations in the number of cases which the police refer to the CPS across England and Wales.²¹

In 2014 the CPS published its revised guidelines which adopt a very basic definition of DV as ‘any incident of threatening behaviour, violence or abuse [psychological, physical, sexual, financial or emotional] between adults who are or have been intimate partners or family members, regardless of gender or sexuality.’²² These guidelines provide basic information to help victims or witnesses of DV understand the legal process.

To get a clearer picture of the legal process it is necessary to look at ‘The (CPS) Director’s Guidance on Charging, 2013’.²³ The individuals who are charged are referred to a magistrate’s court for their case to be heard. Prior to appearing in court the CPS reviews the evidence and decides how to proceed. Cases are remanded to a Magistrate’s Court to take the plea of the accused, assess the evidence and, if the accused pleads guilty, to decide the case.

¹⁸ Towers, J. & S. Walby (2012) *Measuring the Impact of Cuts in Public Expenditure on the Provision of Services to Prevent Violence Against Women and Girls*. Lancaster University. Northern Rock Foundation. January. Available at: < <https://www.nrfoundation.org.uk/downloads/Measuring-the-impact-of-cuts-in-public-expenditure-on-the-provision-of-services-to-prevent-violence-against-women-and-girls-Full-report-3.pdf>>.

¹⁹ Leveson, B (2015) *Review of Efficiency in Criminal Proceedings*. Ministry of Justice. Judiciary of England and Wales. London at 4.

²⁰ Annex 1 of ONS 2016 sets out the stages of the criminal process.

²¹ Bowen, P., Qasim, A. & L. Tetenbaum (2013) *Better Courts: A Snapshot of Domestic Violence Courts in 2013*. Centre for Justice Innovation.

²² See:

<http://www.cps.gov.uk/publications/prosecution/domestic/domv_guide_for_victims_and_witnesses_faqs.html>.

²³ See: <http://www.cps.gov.uk/publications/directors_guidance/dpp_guidance_5.html#a03>.

When individuals plead guilty at the first instance, magistrates nearly always impose a fine rather than sentence the individual to prison (they may also order some form of remedial treatment, set stringent bail conditions and impose a community order aimed at changing the behaviour of the accused).²⁴

If an individual pleads ‘not guilty’ the court schedules a trial at a later date. Typically remand hearings and trials are heard by a panel of 2-3 magistrates or by a District Judge and last between 1.5 and 3 hours depending on the number of witnesses who are to give evidence and the amount and type of evidence that is to be considered. The role and function of magistrates has changed considerably since the 12th century when the institution was created. Today these are lay men and women from the community who have volunteered to sit in judgement on their fellow citizens. They receive minimal legal training and are heavily dependent upon the advice of the courts ‘legal advisor’ who are qualified solicitors. Legal advisors instruct magistrates regarding the issues of law raised by a particular case.

Defendants are increasingly unable to access legal aid which pays for a lawyer to represent them in court. However, in all the cases I observed the defendant *was* represented (sometimes by a solicitor they employed, sometimes by a duty solicitor paid by government). The person who has been abused is called the plaintiff, and their case is argued by a prosecutor (sometimes this is the CPS and sometimes it is a barrister paid to work for the CPS; not infrequently the prosecutor may have limited legal training).

Carlin has described magistrates justice as ‘staged’ and has argued that the court should be seen as a ‘theatre of the absurd’.²⁵ First and foremost she noted that the ‘rules’ which magistrates use to control proceedings and the ‘alliances’ struck between officials, the police, lawyers and probation officers to ‘maintain the credibility of the magistrate’ left defendants baffled and at the mercy of the court. A defendant’s situation was all the more precarious because magistrate’s rebuked defendants and controlled their oral evidence, and because of

²⁴ The type of remedial support can vary. I have observed individuals being required to attend alcohol or drug treatment programmes and to attend ‘integrated domestic abuse programmes’ (Bloomfield, S. & L. Dixon (2015) *An Outcome Evaluation of the Integrated Domestic Abuse Programme and Community Domestic Violence Programme*. Analytic Summary. National Offender Management Service, Ministry of Justice. London. Available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/449008/outcome-evaluation-idap-cdvp.pdf>.

²⁵ Carlin, P (1976a) ‘The Staging of Magistrates’ Justice’, 44 *British Journal of Criminology* 55 and Carlin, P. (1976b) *Magistrates’ Justice*. Martin Robertson: London.

endemic problems of hearing what is said. The entire process, Carlin argued, was ‘a fog of mystification’ which reinforced the power of magistrates at the expense of the defendant.

Subsequent research has shown how the law and legal actors constrain and determine the outcome of the criminal process by ensuring high rates of guilty pleas, thereby deciding a case before it came to trial, and high conviction rates. For instance McBarnet showed that magistrates’ impose ‘summary justice’ – characterized by the fact that defendants are unrepresented, the absence of an indictment, a failure to call witnesses, proceedings in which police are the only complainants, there is no jury and no record of proceedings is kept etc. – in proceedings that are very short.²⁶

McConville & Baldwin’s study of Birmingham Crown Court – and secondarily Crown Courts in London – concluded that ‘institutional arrangements’, which include the dominant role played by the police in criminal investigations and in pre-trial hearings, result in a high percentage of guilty pleas and high conviction rates.²⁷ McConville & Baldwin found that: ‘... criminal procedures in England are structured to produce convictions, within a framework of uncertain protections, confused and ill-defined responsibility, in which informal and even unlawful behavior of various participants [i.e. the police] is directly or indirectly legitimated’.²⁸

McConville et als. research on criminal defence practices found widespread evidence of poor training, poor case preparation and poor legal representation which left many defendants to the mercy of the police and court.²⁹ Summary justice has been evidenced in sentencing³⁰ and in remand and bail decisions.³¹ Bell and Dadomo (2006), who summarize the impact of

²⁶ McBarnet, D (1981) ‘Magistrates’ Courts and the Ideology of Justice’, 181 *British Journal of Law and Society* 197.

²⁷ McConville, M. & J. Baldwin (1981) *Courts, Prosecution and Conviction*. Clarendon: Oxford.

²⁸ Ibid: 188.

²⁹ McConville, Hodgson, M. J., Bridges, A. & A. Pavlovic (1994) *Standing Accused. The Organization and Practice of Criminal Defence Lawyers in the UK*. Clarendon: Oxford.

³⁰ Mulcahy, A (1994) ‘The Justifications of Justice. Legal Practitioners Accounts of Negotiated Settlements in Magistrates’ Courts’, 411 *The British Journal of Criminology* 430; Rungay, J (1995) ‘Custodial Decision Making in Magistrates’ Court’, 201 *British Journal Criminology* 217.

³¹ Doherty, R. & M. East (1985) ‘Bail Decisions in Magistrates’ Courts’, 251 *British Journal of Criminology* 266; Walker, M (1989) ‘The Court Disposal and Remand of White, Afro-caribbean, and Asian Men’, 353 *British Journal Criminology* 367.

legislation from 1990 to 2004 on magistrates' courts, argue that there had been little recent research on magistrate's courts and that what research exists indicates that 'the system of summary justice was fairly haphazard, that courts operated in isolation, and there was a distinct lack of accountability'.³² My observations of magistrate's courts supports this research. In addition it is important to note that budget cuts, a high turnover of court personnel and poorly trained magistrate's produce fairly chaotic hearings that are difficult for laymen to understand.

To conclude, the situation today contrasts sharply with the situation in Bentham's day. With regard to legislation on DV, it is fairly clear that legislators have not carefully and rationally assessed relevant evidence in drafting law. Indeed there appears to be limited reflection about what is required to prevent behavior that clearly creates so much 'unhappiness'. Furthermore there is an apparent rush to legislate without considering the resources required to implement law. In addition, and as will be discussed below, there must be some question about whether magistrate's deliver decisions which are balanced, proportionate and fair and which assist the public to correct their behavior.

The Criminal Case Against 'AK'³³

DV cases are heard in 138 specialist courts across England and Wales. They are tasked with a number of complex objectives which include: increasing the effectiveness of the court systems in providing protection and support to women and appropriate sanctions to perpetrators; enhancing the co-ordination of criminal justice with public and voluntary agencies working with victims of DV and with perpetrators; reducing delays in processing cases through the courts; and reducing rates of victimisation.³⁴ In short the courts are tasked with 'narrowing the justice gap' for victims of DV, many of whom are reluctant to make a complaint or give evidence in court, and with dealing with the impact of DV on victims. The ability of DV courts to integrate advocacy, victim support, the evaluation of risk and of

³² Bell, B. & C. Dadomo (2006) 'Magistrates' Courts and the 2003 Reforms of the Criminal Justice System', 339 *European Journal of Crime, Criminal Law and Criminal Justice* 36 at 343.

³³ I have anonymised the name of all the parties in this case and have changed dates and other information that might reveal personal information about them.

³⁴ Cook, D., Burton, B & A. Robinson (2006) *Enhancing Safety and Justice: The Role of Specialist Domestic Violence Courts in England and Wales*. Paper given to the British Society of Criminology. England.

reoffending, sentencing and the provision of programmes aimed at reducing reoffending is undermined by budget cuts to all the agencies involved. Evaluations of these courts show that they operate in significantly different ways: case preparation appears to vary, as do conviction rates and the sanctions imposed on defendants (indeed victims feel let down by lenient sentences and some continue to be at risk).

AK, an immigrant in his late 80's, appeared before a panel of three magistrates for his remand hearing in March 2017.³⁵ At this hearing, which lasted 11 minutes, he was represented by a solicitor; the CPS, the legal adviser, Probation Services and the DV Court Coordinator were also present.³⁶ Remand hearings are structured to expedite legal proceedings by: hearing the charge, taking the defendant's plea (and if the plea is 'guilty', to sentence the defendant), assess the availability and extent of the evidence, ensure that the police and the CPS are able to bring the evidence and witnesses to the trial, estimate the amount of time needed to hear the case, arrange for any 'special measures' to be in place so that the victims are able to give their evidence, set the time and date of the trial and agree bail conditions. AK was released on unconditional bail (which was unusual since he lived in the same house as the plaintiff) to await his trial which was scheduled to take place in eight weeks.

The court is concerned with assessing whether an alleged incident actually occurred and whether the alleged behavior can be classified as assault/domestic violence.³⁷ In pursuit of this task the legal process seeks to elucidate and evaluate evidence from both parties and to secure, if possible, 'corroborative' evidence.³⁸ In effect the judicial inquiry excludes/strips

³⁵ I attended the remand hearing and the trial and took verbatim notes at both proceedings. I was also able to speak with the CPS and the defendant's solicitor after the trial.

³⁶ The DV coordinator observes proceedings and is responsible for ensuring that information is provided to the Court 'to enable safe decisions to be made. They provide a vital support to the CPS by ensuring that all relevant and appropriate information is available from all agencies. The role of the Coordinator is to maintain records of information from the various agencies and to track cases accurately and ensure that gaps in information are filled.' See: <http://www.standingtogether.org.uk/sites/default/files/docs/SDVC_STADV.pdf>.

³⁷ There is no single definition of domestic violence or domestic abuse; individuals are prosecuted under a range of different offences. See: <<https://fullfact.org/crime/domestic-violence-and-abuse/>>.

³⁸ Ideally evidence comes from a police investigation, but this rarely occurs in domestic violence cases. Corroborative evidence takes the form of footage from the body camera worn by police officers (however most Metropolitan police have not been issued body cameras) and from statements taken by the police. Increasingly claimants submit photographs and/or recordings of incidents, injuries etc. to substantiate their claims.

away the entire history of the relationship between the parties in order to focus on the alleged incident.³⁹ In short, criminal proceedings admit into evidence *only* that which is considered relevant to the alleged offence and excludes information about the history of the social relationship between the defendant and the claimant which might explain the events leading up to the alleged offence. Elsewhere it may be the case that the courts have focused on ‘the violent act itself’ and not the ‘emotional or personal violation’ caused to victims, but this is not the situation in England and Wales.⁴⁰ Even so, there remains a tension in legal proceedings between the court’s need for ‘evidence’ to support a prosecution and fulfil its mandate to prosecute these crimes, and its ability to understand the nature of domestic violence as it is experienced by victims and litigants.

In examining this case I rely on evidence that was admitted and evidence that was excluded by the court in reaching its decision. Criminal trials follow a standard procedure which begins with the CPS reading out the charge, followed by the claimant (and any witnesses) and the defendant who give their evidence and are cross examined. All other forms of evidence are ‘read into the record’ (including photographs), though video evidence is viewed on screen in the court. Sometimes evidence from recordings is played in court; and sometimes a transcript of such evidence is handed to the bench to read.

Two magistrates presided over AK’s trial which began 45 minutes late due to the late running of a previous trial; it took three hours to complete. Poor preparation for the trial meant that a ‘hearing loop’ was not available to assist the defendant to hear the proceedings (an interpreter summarized what was said during the hearing including his evidence to the court) and it granted a last minute request for ‘special measures’ which took the form of allowing the victim/claimant and her son to give evidence from behind a curtain.

At the start of AK’s case the CPS read out the charge:

‘The facts. This is a domestic assault. The charge is assault by beating. The defendant is the claimant’s father. On December 20th, 2016 at the family home the claimant was at home with her son, Mr. N. A verbal altercation took place. The defendant was

³⁹ Evidential requirements mean that the only acceptable evidence is that which relates to the alleged criminal incident. However, the history of a relationship in these cases sheds considerable light on the motivations and culpability of defendants and victims/claimants.

⁴⁰ Engle-Merry, S (1995) ‘Narrating Domestic Violence: Producing the ‘Truth’ of Violence in 19th and 20th Century Hawaiian Courts’, 967 *Law & Social Enquiry* 993.

unhappy with the claimant because he believed she was putting ‘muck’ (dirt) in his room. The defendant became angry and vocal. He approached the claimant, raised his hand – she thinks he is about to hit her – and she covers her face with her left arm. He grabs her left arm and shoves her backwards while shouting at her. The claimant’s son, who was in his bedroom, opens his door and challenges his grandfather at which point the defendant releases his daughter and goes into the kitchen’.

The claimant is called to give her evidence behind the curtain/screen (this takes 27 minutes) and is led by the CPS who takes her through her evidence which begins by swearing an oath to speak the truth. She describes the incident and notes that her son, who was on the phone to his solicitor at the time, did not witness the incident which lasted 6-7 minutes. She said: ‘When my son came out, father let go of my arm’. Part of her evidence was a photo of her arm that was taken by her son on the same day as the incident was alleged to have occurred. Asked ‘what does it show? Describe it’, she stated: ‘Swollen from the wrist up the arm; very red, a very hard blow’. Asked how the incident left her, she said: ‘Scared and nervous. I have to be sure my son is present. I have to be careful ... afraid.’ She went to the GP but did not receive any specific treatment. She reported the incident to the police the following day after speaking to her solicitor.

Under cross-examination the claimant revealed that she had moved into her parent’s home in 1988 and had never worked though she provided care for her mother and took care of the house. On her mother’s death her son was given half of the house; today all the bedrooms have locks on them. In response to questions about the veracity of her allegation that her father ‘charged out of the kitchen’ and assaulted her, she claimed that ‘He is good at putting an act on’ and that ‘He has a serious problem with his temper’. In response to whether her elderly father was capable of pulling and pushing her – she was 57 at the time and was not small in stature – she said: ‘he has a lot of strength’. The claimant also stated that she did not attempt to control him in the house and: ‘I want to live peacefully and quietly’.

The next person to give evidence was the defendant’s grandson who was 33 years old and had never worked (due to a ‘disability’). His testimony (which takes 20 minutes), also given behind a screen, dovetailed with his mother’s evidence. He had been in his bedroom speaking on the phone to his solicitor when he heard ‘dad shouting at my mom’. On coming out of his bedroom he saw his grandfather gripping his mother by the arm and shouting at her. He said to his grandfather: ‘you are abusing her’. At this point the defendant let go of her

arm and walked away. Asked to describe his grandfather's state of mind, the witness said: 'bewildered'... 'he was arguing, enraged and in her face'. 'He is a ticking time bomb, he just kicks off'. In addition to the photo of his mother's arm, the grandson submitted nine photographs secretly taken of his grandfather over a period from 4 months prior to the alleged incident to 10 days before the trial. Asked to describe each photo, the grandson variously stated that 'he was kicking cans', 'wringing out a garment', 'picking up a tv', 'carrying luggage' etc. He was, however, unaware of his grandfather's poor health. In cross examination doubt was cast on what precisely the photographs 'proved', thus while the grandson (and his mother) claimed that the defendant was in good health and quite strong; none of the photos showed the defendant lifting an object.

The next piece of evidence was the statement given by the defendant at the police station. The statement was read into the record and indicated that he denied the allegation. His counsel called him to give evidence. After being sworn in, his testimony (which lasted 17 minutes) was that his daughter had confronted him. He denied touching, pulling, shoving or shouting at her and remarked: 'They didn't call the hospital or the police, nothing happened'. Asked about the photos, he denied that he was able to lift any of the objects he was photographed next to. Asked whether he had access to the entire flat, he replied: 'I never go to their rooms. I stay in the smallest room; they never let me use the other bedroom where my things are locked in. Under cross examination he denied that the alleged event had occurred and stated that: 'They have lived in the house for 22 years, there have been no incidents' and 'I haven't done anything'. Asked why his daughter and grandson are making such an allegation against him, he stated that: 'She wants to grab everything from me'. The magistrates asked the defendant several questions and commented: 'It's one arguing against the other'.

At this point the CPS, followed by the defendant's solicitor summed up their arguments. The CPS stated that 'the case is proved beyond doubt'; while the latter cast doubt on the evidence of the claimant, in particular whether an 87 year-old man was physically capable of the acts she and her son were accusing him of performing. Their motive, it was said, was to 'grab everything' and control the defendant.

The court rose for 15 minutes to allow the magistrates to consider the evidence. When they returned they found that 'the Crown's case was proved'. The grandson's evidence together with the photo of his mother's arm corroborated her claim. After hearing mitigation,

the magistrate's decided to fine rather than imprison the defendant; they set the fine at the lowest tariff (to be paid out of his pension at £5 per week over an 18 month period). As the magistrates left the court room they were overheard saying: 'they all live under the same roof, it [the case] could all come back to court again'.

Discussion. After the trial I spoke to the CPS and the defendant's solicitor who confirmed that the decision could have gone either way. They both believed that relations within the family had been deteriorating for some time and were at the heart of the case. The key factor in the conviction was the photograph of the claimant's arm. I asked the CPS what the claimant had said to her near the conclusion of the case and was told that 'she wanted damages to be considered' by the court and that 'she did not fear him'. She was not terrified of him but she wanted him restrained. Furthermore, I was told that there was already a restraining order in place in the house to control the defendant.

While this is clearly not a 'typical' DV case in the sense of male violence perpetuated against a female, it raises a number of issues about how DV cases are investigated and prosecuted. A very large percent of DV cases begin with a phone call to the police who come to the residence and observe the situation. If officers decide to take action, they take the accused to the station for questioning. At some point the claimant, and perhaps a witness, will provide a police statement. Unless there was a 999 phone call or responding officers happened to wear a body camera when they attended the residence (in which case photographic evidence is submitted), this is the full extent to which the police investigate domestic violence cases.⁴¹

It was not possible to know whether the police consulted the CPS in the decision to charge the defendant. However, in conversation with Crown prosecutors it was made clear to me that the government's position was to 'prosecute, prosecute, prosecute' DV cases which, in light of cases like that of AK, suggests that cases need to be more carefully considered before they are prosecuted. The use of 'special measures' to protect victims clearly needs to be rethought because, as in this case, the individuals giving evidence were not afraid of the

⁴¹ In other DV trials claimants used their phones to take pictures or to record an 'interview' with the accused after the incident. The absence of corroborative evidence, including evidence submitted by the police, is a longstanding problem in prosecuting domestic violence (See: Barnish, M (2004) *Domestic Violence: A Literature Review*. HM Inspectorate of Probation. London at 78).

defendant.⁴² In this case the magistrates committed seven errors in the way they conducted the trial which, fortunately, were corrected by the legal adviser, the CPS or counsel for the defendant. In a sense there was a rush to conclude the proceedings that could have given rise to a wrongful decision.

Finally, if we consider the ‘evidence’ that was excluded from the trial regarding the deteriorating relation between family members and the efforts by the grandson to photograph and thus document his grandfather’s alleged physical abilities and the similarity of his evidence with that of his mother (despite not having been present throughout the incident), the case raises troubling questions as to whether the claimant and her son were using the law to control their elderly relative.

Conclusion

While there is much which could be said about the contemporary relevance of Bentham’s views on legislators and the law, I will restrict my comments to what are arguably the central issues. First it should be clear that today philosophers, lawyers and social scientists are still concerned about how to balance the rights of individuals against the growing power of the state. What is clear, however, is that today a solution to this issue based on psychological hedonism carries little weight. First in assessing evidence and drafting legislation, legislators appear to be driven by party-political concerns with headlines as evidenced by the creation thousands of new criminal offences while simultaneously cutting the budget for the police, courts and victim-related services. Second, as in the past, legislators have failed to define the nature and significance of ‘violence’ which should be adopted into law nor have they carefully considered the kind of sanctions that should be applied to perpetrators given the gendered nature of DV and growing evidence that mandatory arrest and prosecution policies are not working. Third, a critical element missing from Bentham’s argument is a consideration of how the law is actually administered. Today it is clear that regardless of how clearly official statements, policy or law *may* be formulated, its implementation hinges critically on bureaucracy.

In Bentham’s terms, it is difficult to assess the quantum of ‘happiness’ achieved in this case. From the perspective of the law, a conviction vindicated the resources spent

⁴² For some victims the experience of giving evidence is traumatic and the victims evidence is difficult to obtain without numerous adjournments.

prosecuting the case. In this narrow sense the Magistrate's decision can be seen as one that produces 'happiness' by punishing domestic violence. Similarly the defendant's lawyer can be satisfied that her defence of the accused was robust. From the point of view of the 'claimant' (and her son), she was 'happy' because the conviction vindicated her claim and, even though it provided no more protection than she already had, the decision provided her with greater control over the family home. The impact of a conviction against the accused – regardless of the fact that the sentence was a fine – was to leave him bewildered, confused and – depending upon how one reads the evidence – unrepentant and subject to greater control by his daughter. If we step back from the case, it is difficult to see what message the conviction of AK sends to the public about perpetuating 'violence' against intimate partners or family members.

Finally, the difficulty of measuring the quantum of happiness achieved by the law – quite apart from assessing whether law is effective in achieving its objectives – takes us into a debate about what the objectives of law should be and whether it fulfils these objectives. It might be argued that the case of 'AK' is atypical and should not be used to assess this question. However, it's very a-typicality makes it useful because the case raises fundamental questions about the definition of domestic violence and the role of the police and the legal process. The case indicates just how difficult it is to assess the social impact of law on society – whether defined in terms of happiness, justice or the realization of human rights – and it makes it clear that the solution does not lie in creating more law or pursuing endless litigation. Instead it is necessary to rethink the role of government with regard to how it governs an increasingly diverse society which does not share common social, religious or popular views about public morality, responsible behaviour or about the role of the state.