

## Competing Narratives in a Case Biography: A Tale of Two Citadels

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*This article is the fourth in a series introducing the reader to methods and theories relevant to advancing socio-legal research. They are written for the curious rather than the expert reader and provide illustrations of how the theories, methods, and frameworks have been employed and might be used in your work.*

*This article explores the use of case biography methods for socio-legal studies. Drawing on ‘paths to justice’ studies, network analysis, and legal archaeology, we develop a case study of AC v. Berkshire West Primary Care Trust. We show how the judicial determination of the case suppressed a transgender rights narrative construction of the dispute in favour of one about health care law. Our case biography analysis explores how competing narratives can be traced not only through legal argument and literature, but also through the personnel involved, in ways that are obscured by formal records. Paying attention to biographical features leads to a richer understanding of cases, including the importance of pre- and post-judicial decision-making aspects.*

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## INTRODUCTION

[I]t is no more than common sense to appreciate that it is misguided, if other relevant materials exist, to rely upon law reports alone to tell us what happened in the case.<sup>1</sup>

This article considers the uses of case biography methods for socio-legal studies. It reports on an aspect of a project funded by the British Academy and the Leverhulme Trust which explored methodologies for studying test cases in health care law from the perspective of their having biographies – ‘lives’ that could be mapped and analysed.<sup>2</sup> The approach adopted here draws on ‘paths to justice’ studies,<sup>3</sup> network analysis,<sup>4</sup> legal archaeology,<sup>5</sup> and the idea of developing a ‘thick’ case study,<sup>6</sup> exploring the historical and social contexts in which the focal legal case was situated.<sup>7</sup>

Cases are episodes in history that can be studied in many ways. Traditional legal scholarship has focused on their significance within the legal system, typically their consistency with expectations and precedential ‘weight’. For the individuals involved, litigation is an episode in their lives, and legal decisions feature in many biographies and autobiographies.<sup>8</sup> Sometimes, cases gain a notoriety that attracts studies in their own right.<sup>9</sup> This may be

- 1 A. W. B. Simpson, *Leading Cases in the Common Law* (1995) 11.
- 2 As opposed to legal biographies or ‘legal life writing’, on which see R. G. Parry, ‘Is Legal Biography Really Legal Scholarship?’ (2010) 30 *Legal Studies* 208; L. Mulcahy and D. Sugarman, Special Edition on ‘Legal Life Writing: Marginalized Subjects and Sources’ (2015) 42 *J. of Law and Society* 1.
- 3 P. Pleasance and N. Balmer, *How People Resolve ‘Legal’ Problems* (2014), at <<https://research.legalservicesboard.org.uk/wp-content/media/How-People-Resolve-Legal-Problems.pdf>>.
- 4 J. H. Fowler et al., ‘Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court’ (2007) 15 *Political Analysis* 324.
- 5 Peter Fitzpatrick was credited with the genesis of this phraseology by Simpson, op. cit., n. 1, p. 12. Colloquial references to ‘doing a Simpson’ can be found in the literature: W. Twining, ‘What Is the Point of Legal Archaeology?’ (2012) 3 *Transnational Legal Theory* 166, at 166.
- 6 D. L. Threedy, ‘Legal Archaeology and Feminist Legal Theory: A Case Study of Gender and Domestic Violence’ (2007–2008) 29 *Women’s Rights Law Reporter* 171, at 172; Twining, id., p. 168.
- 7 For example, R. Danzig, ‘*Hadley v. Baxendale*: A Study in the Industrialisation of the Law’ (1975) 4 *The J. of Legal Studies* 249; A. W. B. Simpson, *Cannibalism and the Common Law* (1984, reprinted 1994); Simpson, op. cit., n. 1; D. L. Threedy, ‘A Fish Story: *Alaska Packers’ Association v. Domenico*’ (2000) *Utah Law Rev.* 185; D. L. Threedy, ‘Unearthing Subversion within Legal Archaeology’ (2003) 13 *Texas J. of Women and the Law* 125, at 126; D. L. Threedy, ‘Legal Archaeology: Excavating Cases, Reconstructing Context’ (2006) 80 *Tulane Law Rev.* 1197; M. Chapman, *The Snail and the Ginger Beer* (2010).
- 8 See the LSE’s Legal Biography Project: <<http://www.lse.ac.uk/law/legal-biography-project/book-collection>>; V. Gillick, *A Mother’s Tale* (1989); D. Blood, *Flesh and Blood: The Human Story behind the Headlines* (2004).
- 9 S. Barclay, *Jaymee: The Story of Child B* (1996); P. Devlin, *Easing the Passing* (1985); Simpson, op. cit., n. 1; Simpson, op. cit., n. 7; Chapman, op. cit., n. 7.

because they are episodes within broader significant historical or cultural movements. In such examples, the lives of the protagonists in litigation are often lost to legal history by a focus on legal discourse.<sup>10</sup> Some cases may be more significant for the clashes of values that they embody than for their contribution to the development of legal doctrine.<sup>11</sup>

We set out to explore whether thinking about the study of a case as a biographical exercise would constitute a useful complement to existing methodologies. Since we began this project, a similar approach was adopted by Sheldon et al. to another form of legal ‘product’, the statute,<sup>12</sup> and a series of ‘Lives of Great Religious Books’ has been launched that offers biographical accounts of sacred texts.<sup>13</sup> These show that the published text is neither the beginning nor the end of the life in question. Thus, on Exodus, Baden writes that ‘the Biblical book is itself but one literary version’ of the story that lies behind it, which in turn ‘is like a person who made a mark in multiple walks of life – political, for example, plus literary, musical, religious, and scientific’; he traces the biography from its pre-literary forms through ritual practices in Judaism and Christianity, the formulation of political identities, human rights, and liberation theology.<sup>14</sup> These developments confirmed our sense that tracking the lives of cases might be rewarding. The case that we discuss in this piece, *AC v. Berkshire West Primary Care Trust*,<sup>15</sup> was understood very differently by participants in an exploratory conference. Some saw it as a case concerning transgender rights, which happened to become problematic in an encounter with the National Health Service (NHS). Others saw the litigation as concerned with how the NHS rationed its scarce resources at the boundaries of therapy and cosmetic interventions. We examine how it was possible that the same material could be imbued with such different meanings and understood in such different ways. The biographical approach draws on a number of methodological tools to describe the identity of a case over time.

Legal archaeology regards cases as ‘fragments of antiquity’ that can be freed from ‘the overburden of legal dogmatics’, related ‘to other evidence, which has to be sought outside the law library, to make sense of them as events in history and incidents in the evolution of the law’.<sup>16</sup> This focus on the context and influences on decisions means that it is perhaps strongest

- 10 R. Auchmuty, ‘Whatever Happened to Miss Bebb?’ (2011) 31 *Legal Studies* 199.
- 11 D. Morgan and R. Lee, ‘Regulating the Risk Society: Stigmata Cases, Scientific Citizenship and Biomedical Diplomacy’ (2001) 23 *Sydney Law Rev.* 297.
- 12 S. Sheldon et al., ‘The Abortion Act (1967): A Biography’ (2019) 39 *Legal Studies* 18.
- 13 <<https://press.princeton.edu/series/lives-of-great-religious-books>>.
- 14 J. Baden, *The Book of Exodus: A Biography* (2019) xiii–xiv.
- 15 *AC v. Berkshire West Primary Care Trust* [2011] EWCA Civ 247; [2011] All ER (D) 128 (Mar).
- 16 Simpson, op. cit., n. 1, p. 12. It has been suggested that the work of pathologists might be at least as close a metaphor for this process; J. Maute, ‘The Values of Legal Archaeology’ (2000) *Utah Law Rev.* 223, at 224.

in its contribution to history,<sup>17</sup> better suited to shedding light on how things have come to be, than on why, or what they mean. A case biography method might enable the integration of data in a way that assists balancing the insights that these ‘archaeological’ methods make accessible. A more Foucauldian approach to legal archaeology places the focus on structures of power that pervade decision making.<sup>18</sup> Novkov argues that the archaeological approach has advantages over a genealogical one because it can better account for the concrete ways in which power is institutionalized.<sup>19</sup> In a common law system, in which cases are the currency of transactions, a case biography method can explore this possibility.

Socio-legal work on ‘paths to justice’ explores how human problems become legal ones, acknowledging that not all justiciable issues are recognized or pursued through legal processes.<sup>20</sup> Felstiner, Abel, and Sarat offer an analytical framework for understanding the process of ‘claiming’ through legal actions, in which a ‘transformation perspective places disputants at the center of the sociological study of law; it directs our attention to individuals as the creators of opportunities for law and legal activity’.<sup>21</sup> This may result in the case having a ‘legal’ life in which the voices, values, and attitudes of the parties become suppressed by those of lawyers.<sup>22</sup> Legal processes may encourage parties to describe their disputes in particular, legally significant ways in order to achieve their goals. Ingleby reports parties agreeing to stress an act of adultery in order to achieve an early divorce, whether or not this was perceived as the most significant cause of marital breakdown.<sup>23</sup> In such circumstances, there may seem to be ‘two different divorces: lawyers with a legal divorce, clients with a social and emotional divorce’.<sup>24</sup> The clients may not themselves have the same experience of the divorce, so it is not merely a question of translation of social ‘realities’ into legal ones, but a more complex process of mediation of meanings.<sup>25</sup> Translation is not a linear process, and ‘transforms’ the issues rather than merely rephrasing them – commonly narrowing them to the subset of human issues that is recognizable in legal discourse, but sometimes

17 Maute, id., p. 247.

18 J. Novkov, ‘Legal Archaeology’ (2011) 64 *Political Research Q.* 348.

19 Id., pp. 353–355.

20 H. Genn, *Paths to Justice: What People Do and Think about Going to Law* (1999).

21 W. Felstiner et al., ‘The Emergence and Transformation of Disputes: Naming, Blaming and Claiming’ (1980–1981) 15 *Law and Society Rev.* 631, at 633.

22 C. Cunningham, ‘Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse’ (1992) 77 *Cornell Law Rev.* 1298.

23 R. Ingleby, ‘Matrimonial Breakdown and the Legal Process: The Limitations of No-Fault Divorce’ (1989) 11 *Law and Policy* 1, at 4–5.

24 J. Griffiths, ‘What Do Dutch Lawyers Actually Do in Divorce Cases?’ (1986) 20 *Law and Society Rev.* 135, at 155.

25 D. Vaughan, *Uncoupling: Turning Points in Intimate Relationships* (1986).

expanding them in a manner that requires the frames of reference to be reconsidered.<sup>26</sup>

The studies cited above explored the way in which problems become legal, but paid less attention to the way in which legal disputes become cases – coming before a judge for adjudication. When this is contemplated, the number of legal actors is extended and translation into a particular type of adversarial context is required. Ingleby's work has shown how the theory developed by Mnookin and Kornhauser<sup>27</sup> – that the 'shadow' of the law (in particular, the impact of predicted judicial decisions on bargaining processes) determines negotiations in lawyers' offices – is too simplistic.<sup>28</sup> However, the closer a legal dispute gets to a judicial determination, the more it will be shaped by the ground rules of litigation. We need to be aware of the paths by which the issues reached the courts and were reshaped by legal processes, but we should not ignore the specific dynamics of the way in which cases develop, and live on in the world of lawyers after the specific disputes that gave rise to them are resolved. Case biography offers a means of capturing these additional dimensions without disregarding the insights of 'paths to justice' work.

The networks around cases are complex. While the accounts of parties have been noted, it is less well appreciated how cases are influenced by the lives of the lawyers involved. Each decision is a node in a network connecting actors in repeated interactions; the legal profession is a relatively small community, particularly in specialist areas. The case biography method seeks to understand how the life of the case intersects with all of those who are engaged with it. Just as a human biography will seek to map the influences that have shaped the subject, so a case biography needs to paint a rich picture of how the identity of the case has been constructed. Cases are also networked with other cases – whether to be distinguished as irrelevant, to be followed as a precedent, or merely to be cited in passing. The mapping of these networks provides important data, but offers limited meaning unless placed in context. The case biography method anticipates that our understanding of legal decisions and law-making processes will become richer when they are located not only in social, political, and doctrinal contexts, but also when considered over time. Cases are unlike people in that they lack agency, so that meaning is not constructed out of the choices made by the biographee,<sup>29</sup> but through the way in which meanings are ascribed to it by others. These include, of course, the biographer. Holmes points out that biography is 'essentially,

26 L. Mather and B. Yngvesson, 'Language, Audience, and the Transformation of Disputes' (1980) 15 *Law and Society Rev.* 775.

27 R. H. Mnookin and L. Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law J.* 950.

28 R. Ingleby, 'Rhetoric and Reality: Regulation of Out-of-Court Activity in Matrimonial Proceedings' (1989) 9 *Oxford J. of Legal Studies* 230; R. Ingleby, *Solicitors and Divorce* (1992).

29 Parry, *op. cit.*, n. 2.

and by its very origins disreputable'; it is 'Invention marrying Truth.... The inventive, shaping instinct of the story-teller struggles with the ideal of a permanent, historical, and objective document.'<sup>30</sup> Biographical accounts may reveal more about the biographer's views than the biographee.

For case biography, there are important issues about the boundaries of what is being studied. In traditional legal scholarship, the subject matter is delineated by various factors, including the admissibility of evidence and arguments, the formalities of pleadings, judgment writing, and case reporting.<sup>31</sup> Concern about these types of constraints of judicial decision making can be seen in the exercise set for authors in the Feminist Judgments project. The editors noted the importance of contextualizing decisions, but also highlighted the limitations of judicial decision making given the partial (and partisan) representations of the facts that were placed before the courts, and the need to rely on the expert testimonies actually available even where they might be considered questionable.<sup>32</sup> This approach draws attention to the importance of how the 'story' of the case is told, and in particular how it might be told differently by a different judge with a different set of assumptions.<sup>33</sup> There is a tradition of judicial biography in which the heroic judge is the main architect of decisions.<sup>34</sup> More commonly, it is claimed that judges' contributions are incremental (as in Dworkin's metaphor of the chain novel),<sup>35</sup> but this may be little more than a smokescreen to justify the political dimensions of judging.<sup>36</sup> The language used in judgments betrays the assumptions and prejudices of the judges, based on their understanding of the social and political values at stake, connecting the life of the case with the life of the judges and also with the public lives of citizens.<sup>37</sup> Close reading permits the choices that have been made in the construction of the narrative to be excavated.<sup>38</sup>

Such textual (re)construction enables the exploration of some aspects of the process by which a case develops its identity. However, it neglects both the way in which the opportunity to create the narrative was constituted, and also how subsequent reflection on the case serves to develop further its 'life

30 R. Holmes, 'Biography: Inventing the Truth' in *The Art of Literary Biography*, ed. J. Batchelor (1995) 20.

31 M. Zander, *The Law-Making Process* (2015) 208–402.

32 R. Hunter et al., 'Feminist Judgments: An Introduction' in *Feminist Judgments: From Theory to Practice*, eds. R. Hunter et al. (2010) 3.

33 R. Hunter, 'An Account of Feminist Judging' in Hunter et al., id., p. 30.

34 See in this vein, A. Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (2012). See Maute, op. cit., n. 16 for a discussion of the impact of the biographies of the four judges in a single decision.

35 R. Dworkin, *Law's Empire* (1986), especially 151–175.

36 R. Dworkin, *A Matter of Principle* (1985) 9–32, reflecting on J. A. G. Griffiths, *The Politics of the Judiciary* (1977); see also Zander, op. cit., n. 31, pp. 344–363.

37 P. Goodrich, 'Law and Language: An Historical and Critical Introduction' (1984) 11 *J. of Law and Society* 173.

38 J. Montgomery, 'Rhetoric and "Welfare"' (1989) 9 *Oxford J. of Legal Studies* 395.

story'. The case biography method seeks to expand the frame in order to offer a richer account of the processes by which law is made. It enables those choices to be placed in frameworks of significance and meaning. There has been a long tradition of scholarly interest in 'leading cases',<sup>39</sup> and appellate decisions get the most attention.<sup>40</sup> Our case study enabled us to consider differences in the first instance and appellate levels of the decision and led us to the conclusion that much is lost by neglecting the lower levels of judicial activity.

## THE CASE

The legal tale of *AC v. Berkshire West Primary Care Trust* (hereafter *AC*; italics indicate a reference to the case as opposed to the claimant *AC*), at the High Court<sup>41</sup> and subsequently the Court of Appeal,<sup>42</sup> concerned a transgender<sup>43</sup> claimant who unsuccessfully sought to challenge the Primary Care Trust's (PCT) refusal to fund her breast augmentation surgery. *AC* was born male in 1951; in 1996, she was diagnosed with gender identity disorder and began hormone therapy as part of gender reassignment treatment. However, her breast development was limited, and in May 2006 she applied to the PCT for funding for augmentation mammoplasty. *AC*'s request was initially refused in June 2006 and, following 'a protracted internal appeals process with two complaints upheld by the Health [sic] Commission', that decision was reiterated in December 2008, some two months after *AC* had initiated legal proceedings.<sup>44</sup>

39 For example, Simpson, *op. cit.*, n. 1; Simpson, *op. cit.*, n. 7; Chapman, *op. cit.*, n. 7; see the 'Landmark Cases' series: <<https://www.bloomsburyprofessional.com/uk/series/landmark-cases/>>.

40 Novkov, *op. cit.*, n. 18, p. 351.

41 *AC v. Berkshire West Primary Care Trust* [2010] EWHC 1162 (Admin); [2010] All ER (D) 229 (May).

42 *AC*, *op. cit.*, n. 15.

43 We recognize that the terminology in this area is varied and in flux. The umbrella term 'transgender' is used here, but on occasion we refer to specific claimants as 'transsexual' as per the law reports. See further the definitions provided by the Gender Identity Research and Education Society (2018), at <<https://www.gires.org.uk/wp-content/uploads/2018/04/Terminology-Section-April-2018.pdf>>.

44 *AC*, *op. cit.*, n. 15, [13]. The first refusal was upheld on appeal by the PCT's Case Review Committee in August 2006, and subsequently by the Appeals Panel in May 2007. A complaint to the Healthcare Commission resulted in the case manager describing the PCT's rationale for its decision as 'poor'. Further correspondence ensued, ultimately leading to a second decision by the Case Review Committee in July 2008 upholding the PCT's refusal. *AC*'s claim was lodged on 30 September 2008. In November 2008, the Case Review Committee affirmed its earlier refusal, which appears to have been communicated to *AC* on 5 December 2008; also *AC*, *op. cit.*, n. 41, [17]–[18].

Although for the most part AC's voice was absent from the law reports, there was a notable exception in the Court of Appeal transcript, which gave some insight into why legal proceedings were initiated:

I have exceptional circumstances in that I haven't developed proper breasts. For a male to female transsexual to have breasts is a very natural and moral request. It is also necessary to establish feminisation in my journey from male to female. My life will be one of turmoil if this is denied. Not fully knowing what or who I am and neither will those around me in every day [sic] life.

Hormones also make one impotent, cause the penis to shrink and libido diminishes to nil. Hormones haven't changed my form, my body is still recognisably male after 11 years of treatment. ... I have to carry on as I am, unable to be a woman, and hopeless sexually as a man.<sup>45</sup>

The personal significance of AC's journey is further supported by correspondence with the authors, in which she stated:

I get the point with mine [legal case], I am that transsexual, but sadly, and despite all the support and relative info [sic], Judge Bean didn't share my enthusiasm for my personal journey and what it implied, or demanded by NHS resources, as small as they were compared to what the NHS/Social Services/DWP have paid out since as a result.<sup>46</sup>

AC's litigation was, therefore, borne of the unsatisfactory results attained following 11 years of hormone therapy and two years of wrangling with the PCT.

Her account suggests that the legal proceedings failed to align with the significance of the issue in her life story. However, given the potential implications for NHS resources, the impact of the decision would inevitably ripple beyond the specific dispute. Our examination of the materials generated during the litigation shows how the judicial determination of the case involved suppressing one possible narrative construction of the dispute in favour of another. This can be considered within the structured legal arguments, whereby the narrative framing of disputes has a dispositive effect, and it adds persuasive force to the doctrinal reasoning deployed to explain judicial decisions.<sup>47</sup> In this instance, breast augmentation surgery was classified by the PCT as a 'non-core' procedure (in the context of its gender identity disorder services), and thus deemed a 'low priority' in its funding policies.<sup>48</sup> In addition, the PCT found that the claimant had failed to demonstrate 'exceptional circumstances' that would have warranted funding

45 AC, op. cit., n. 15, [6]. The concept of 'exceptional circumstances' is explained below.

46 AC, email, 14 April 2016, on file with the authors.

47 However, as we have explored elsewhere, law reports can contain accounts that resolve competing narratives in ways that go beyond merely determining factual disputes; J. Montgomery et al., 'Hidden Law-Making in the Province of Medical Jurisprudence' (2014) *Modern Law Rev.* 343, at 360–364.

48 AC, op. cit., n. 41, [6], [13]–[15].

the intervention.<sup>49</sup> Accordingly, the PCT's lawyers constructed the matter as a case about NHS rationing. The claimant's legal team, however, positioned it as a case about discrimination against transgender people, placed within a narrative concerning the increasing recognition of transgender people in Anglo-Welsh law.<sup>50</sup>

The significance of narrative can also be considered from an external perspective.<sup>51</sup> Framing effects can be identified throughout the history of a case, both prior to judicial decision making and subsequent to court rulings. In our study of *AC*, we found that the key narratives had independent lives beyond the specific dispute and also that each could be articulated without reference to the other. Each could be considered through the metaphor of a siege, with the case being a small skirmish in the assault on a citadel. In the claimant's narrative, the siege sought to break down the barriers that prevented transgender people receiving full recognition in Anglo-Welsh law and society. It began with an assault on traditional definitions of marriage,<sup>52</sup> fought through reluctance to accept transgender status as a protected characteristic,<sup>53</sup> and then battled to secure positive support for fuller integration into society through the funding of necessary gender reassignment treatments (that is, based on clinical need).<sup>54</sup> Here, the citadel walls were defended by those resistant to equal recognition of transgender persons.

In the alternative narrative, the fight was to wrestle resource allocation decisions away from professional and managerial discretion into rights-based scrutiny. This citadel was defended by those who were concerned to privilege bureaucratically rational, collectivist, objective decision making over personalized, demand-led care. Here, the case of *AC* took its place in the ebb and flow of judicial decisions – sometimes deferring to health authorities

49 *Id.*, [20]. See A. Ford, 'The Concept of Exceptionality: A Legal Farce' (2012) 20 *Medical Law Rev.* 304.

50 A third perspective emerged in the intervention by the Equality and Human Rights Commission, which focused on the PCT's public sector equality duties. We discuss this subsidiary narrative further below, including whether it belongs more closely with the rationing or discrimination framing.

51 C. Mitchell, 'Narrativising Contract Law' (2009) 29 *Legal Studies* 19.

52 See the string of cases beginning with *Corbett v. Ashley* [1970] 2 All ER 654, through *Rees v. UK* [1987] 2 FLR 111, *Cossey v. UK* [1993] 2 FCR 97, *B v. France* [1993] 2 FCR 145, *Sheffield and Horsham v. UK* [1998] 2 FLR 928, and *B v. B* (2000) 58 BMLR 52, and culminating in *Goodwin v. UK* [2002] 2 FLR 487, *I v. UK* [2002] 2 FLR 518, and *Bellinger v. Bellinger* [2003] UKHL 21. See also *X, Y and Z v. UK* [1997] 3 FCR 341, on the (lack of) recognition as a parent, and the right to private and family life under Article 8.

53 *P v. S and Cornwall CC* [1996] 2 FLR 347; *A v. Chief Constable of West Yorkshire* [2004] UKHL 21; and, more recently, *R (C) v. Secretary of State for Work and Pensions* [2017] UKSC 72.

54 *R v. North West Lancashire HA ex parte A, D and G* [2000] 1 WLR 977.

in the name of parliamentary sovereignty,<sup>55</sup> and at other times championing the rights of individuals against the state.<sup>56</sup>

Our case biography explores how these competing narratives can be traced through various connections within these lines of cases, not only through legal argument and commentary but also through the personnel involved, in ways that are obscured by formal records. In particular, the respective legal teams seemed to have different expectations of how the situation would be regarded in law. This factor may have raised the stakes, in that judicial preference for one narrative over another would confer an immediate advantage on the team selected for that particular battle. Paying attention to these biographical features of cases shows the importance of both pre- and post-judicial decision making in understanding the social construction of the dispute and the law-making processes that it can obscure.<sup>57</sup>

### MAPPING THE CASE AND ITS CONTEXTS

The application of network theory to the operation of the doctrine of legal precedent can demonstrate which cases have the greatest ‘legal importance’, measured by frequent citation.<sup>58</sup> Significance can be mapped and calculated by analysing citations (inward, where the case was cited by others, and outward, where it cited other decisions). Thus, Fowler et al. considered the significance of *Roe v. Wade* in decisions of the US Supreme Court, both generally and also in the context of decisions specifically concerning abortion.<sup>59</sup> This showed that it is a case that is relatively insignificant for the overall body of US Supreme Court jurisprudence, but is central to the network of abortion decisions.<sup>60</sup> In mapping the case biography of *AC*, the first line of enquiry was to examine how it was connected to other judicial decisions through citations. This analysis plotted one perspective on the legal origins and subsequent impact of the decision by identifying the cases cited in the judgment, and later decisions in which *AC* was itself cited. Drawing on network analysis, this is a method – with, in this instance, a very small dataset – of mapping the place of cases as nodes within the legal network. However,

55 *R v. Central Birmingham HA, ex parte Collier* (6 January 1988, unreported); *R v. Cambridge HA, ex parte B* [1995] 1 WLR 898.

56 *R (Rogers) v. Swindon NHS PCT and Secretary of State for Health* [2006] EWHC 171 (Admin), (2006) 88 BMLR 177; *R (Otley) v. Barking and Dagenham NHS PCT* [2007] EWHC 1927 (Admin); *R (Murphy) v. Salford PCT* [2008] EWHC 1908 (Admin); *R (Ross) v. West Sussex PCT* [2008] EWHC 2252 (Admin); D. Wang, ‘From Wednesbury Unreasonableness to Accountability for Reasonableness’ (2017) 76 *Cambridge Law J.* 642.

57 Zander, op. cit., n. 31; Montgomery et al., op. cit., n. 47.

58 Fowler et al., op. cit., n. 4; W. M. Landes et al., ‘Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges’ (1998) 27 *J. of Legal Studies* 271.

59 Fowler et al., id., p. 334, Table 1.

60 Id., p. 326, Figure 1; p. 329, Figure 2.

given the potential limitations of this approach, we also sought to trace and examine alternative connections.

Other considerations of legal network analysis have stressed a different type of connectivity – not within the discursive structure of law so much as the social architecture through which it is developed.<sup>61</sup> Katz et al. argue that ‘network-induced judge-level change occurs when the probability of a judge supporting a particular policy position is impacted by the policy positions taken by the community of individuals with whom he or she shares social or professional connections’.<sup>62</sup> Similarly, in reflecting on citation analysis as a measure of judicial influence, Landes et al. ask whether it might be possible to identify networks of judges and circuits through a ‘sociology of citation practices’.<sup>63</sup> For our purposes – with a sole case under examination – these approaches identified a second type of connection that needed to be plotted: the network of legal actors. Although we did ‘follow the actors’, this was not a full actor-network theory project, not least due to the absence of ethnographic and/or interview data that would have helped to inform an account of the construction of heterogenous networks in this context.<sup>64</sup> This methodological approach would be useful for future work.

The brief for our research programme was agreed at a one-day scoping symposium; it included the analysis of a small number of selected health care law cases, using different methods to scope the potential for biographical analyses to illuminate the picture(s) that they presented. We set out to understand – primarily through desk-based research – how the case of *AC* was linked to others. To do this, we sought to situate *AC* in its place within the chain of case law, within a network of legal actors, and in context within the legal literature, thus providing a map of the case’s ‘family tree’, drawn from data available on Lexis Library and Westlaw. We did not identify any relevant archival materials; this may be explained by the fact that *AC* was a fairly recent decision and, albeit heard at appellate court level, it seemed to lack the ‘leading’<sup>65</sup> status of other cases that have been the subject of legal archaeology studies.<sup>66</sup> Our initial results were presented at a two-day project

61 D. Katz et al., ‘Social Architecture, Judicial Peer Effects and the “Evolution” of the Law: Toward a Positive Theory of Judicial Social Structure’ (2008) 24 *Georgia State University Law Rev.* 975, at 979.

62 *Id.*, p. 987.

63 Landes et al., *op. cit.*, n. 58, p. 326.

64 B. Latour, *Reassembling the Social* (2005) 12; D. Cowan and H. Carr, ‘Actor-Network Theory, Implementation and the Private Landlord’ (2008) 35 *J. of Law and Society* 149; C. Rooke et al. ‘Actor-Network Theory and the Regulatory Governance of Nicotine in the United Kingdom’ (2012) 39 *J. of Law and Society* 39; E. Cloatre, ‘Law and ANT (and Its Kin): Possibilities, Challenges, and Ways Forward’ (2018) 45 *J. of Law and Society* 646.

65 However, Threedy is clear that the ‘focus of study in legal archaeology should not be limited to “major” cases’. Threedy, *op. cit.*, n. 6, p. 173.

66 Both Simpson and Chapman drew extensively on archival research. Simpson, *op. cit.*, n. 1; Simpson, *op. cit.*, n. 7; Chapman, *op. cit.*, n. 7.

colloquium where, in relation to *AC*, we focused on the ‘narrative choices’ of the protagonists. Follow-up research thereafter included sourcing additional biographical information about the legal actors; two Freedom of Information requests to the Equality and Human Rights Commission (EHRC) regarding its intervention in the case;<sup>67</sup> and email exchanges with the anonymous claimant, *AC*.<sup>68</sup>

### 1. ‘Legal’ networks: a citation analysis

As we plotted the legal authorities cited in our index case, *AC* seemed to have a place between two distinct networks of court decisions; one concerned the legal regulation of NHS rationing, and the second focused on the legal recognition of transgender individuals. At the High Court, reference was made to five NHS rationing cases,<sup>69</sup> of which one appeared in the Court of Appeal decision.<sup>70</sup> One case was cited with regard to the recognition of transgender individuals in the High Court,<sup>71</sup> and another on appeal.<sup>72</sup> Five discrimination/equality of opportunity cases were cited in the High Court decision,<sup>73</sup> of which two appeared in the Court of Appeal transcript,<sup>74</sup> together with an additional example,<sup>75</sup> and reference to a House of Lords authority on the general unhelpfulness of an ‘exceptional circumstances’ test for decision making.<sup>76</sup> Few cases have subsequently cited *AC*,<sup>77</sup> and those have focused around NHS rationing and the lawfulness of Clinical Commissioning Groups’ policies on the use of off-label/unlicensed medicines,<sup>78</sup> gender recognition

67 EHRC FOI942, response dated 13 November 2015; FOI976, 11 May 2016.

68 Ethics approval was secured for this engagement (University of Southampton, ethics number 23247).

69 *R v. Cambridge Health Authority, ex parte B* [1995] 1 WLR 898; *North West Lancashire*, op. cit., n. 54; *R (Rogers) v. Swindon PCT* [2006] 1 WLR 2649; *A v. West Middlesex University Hospital NHST* [2008] EWHC 855; *Eisai Ltd v. National Institute for Health and Clinical Excellence* [2007] EWHC 1941 (Admin).

70 *North West Lancashire*, op. cit., n. 54.

71 *Goodwin v. UK* (2002) 35 EHRR 18.

72 *Van Kuck v. Germany* (35968/97) (2003) 37 EHRR 51.

73 *Matadeen v. Pointu* [1999] AC 98; *R (Kaur) v. London Borough of Ealing* [2008] EWCH 2062 (Admin); *Webb v. EMO Air Cargo (UK) Ltd (No 2)* [1995] ICR 1021; *R (Baker) v. Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 315 (Admin).

74 *Matadeen v. Pointu*, id.; *Webb v. EMO Air Cargo (UK) Ltd* [1994] QB 718.

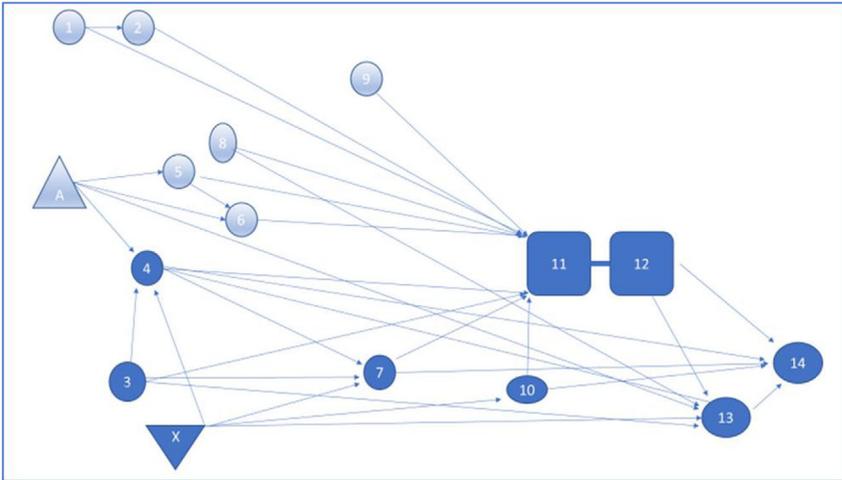
75 *James v. Eastleigh BC* [1990] 2 AC 751.

76 *Huang v. Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167. This is an immigration case and the test should not be confused with ‘exceptionality’ in the context of health care.

77 Lexis Library and Westlaw searches on 27 August 2019 found five citations in arguments and judgments.

78 The High Court and Court of Appeal decisions were both cited in *R (Condliff) v. North Staffordshire PCT* [2011] EWHC 872 (Admin), at [44] and [39] respectively, per Waksman J. The Court of Appeal decision was referred to in argument in *R*

**Figure 1. AC citation network**



and discrimination,<sup>79</sup> and immigration.<sup>80</sup> These cases, in turn, have drawn on authorities from the NHS rationing narrative and the transgender narrative;<sup>81</sup> thus, the *AC* decisions provided a node that connected these networks.

Figure 1 maps the inward and outward citations within the *AC* judgments to illustrate how they are connected to each other. The *AC* judgments are represented by the squares. Each circle represents a case cited in *AC* or a case that cites *AC*.<sup>82</sup> Two additional cases were added, represented by

(*Condliff*) v. *North Staffordshire PCT* [2011] EWCA Civ 910, and noted in *Bayer* v. *NHS Darlington CCG* [2018] EWHC 2465 (Admin), at [46], per Whipple J.

79 The Court of Appeal decision was referred to in the skeleton (although not oral) argument in *Carpenter* v. *Secretary of State for Justice* [2015] EWHC 464 (Admin).

80 As authority on the ‘exceptional circumstances’ test, in *R (Luis Rozo-Hermida) v. Secretary of State for the Home Department* [2011] EWHC 695 (Admin), at [21] Bean J cited the Court of Appeal in *AC*, in which he had been the High Court judge. One might speculate whether it was his familiarity that led him to cite *AC* rather than the higher authority of *Huang*, op. cit., n. 76, to essentially the same effect.

81 For example, *Bayer*, op. cit., n. 78, cited the following cases: *North West Lancashire*, op. cit., n. 54; *Rogers*, op. cit., n. 69; and *Condliff*, op. cit., n. 78. Similarly, in the High Court in *Condliff*, the following cases were cited: *North West Lancashire*, op. cit., n. 54; *R v. North East Devon Health Authority, ex parte Coughlan* (1998) 47 BMLR 27; *Cambridge Health Authority*, op. cit., n. 69; and *Cossey*, op. cit., n. 52.

82 The key to Figure 1 is: (1) *James*, op. cit., n. 75; (2) *Webb* (combining HL and ECJ for representation purposes), op. cit., n. 73 and n. 74; (3) *Cambridge Health Authority*, op. cit., n. 69; (4) *North West Lancashire*, op. cit., n. 54; (5) *Goodwin*, op. cit., n. 71; (6) *Van Kuck*, op. cit., n. 72; (7) *Rogers*, op. cit., n. 69; (8) *Huang*, op. cit., n. 76; (9) *Baker*, op. cit., n. 73; (10) *Eisai*, op. cit., n. 69; (11) *AC* (HC), op. cit., n. 41; (12) *AC* (CA), op. cit., n. 15; (13) *Condliff*, op., cit., n. 78; (14) *Bayer*, op. cit., n. 78.

triangles, to illustrate leading cases from the transgender rights<sup>83</sup> and NHS rationing networks<sup>84</sup> of precedents that fed into the decision in *North West Lancashire*,<sup>85</sup> to which *AC* was connected in terms of the claimant's legal team (see below), as well as through citation. Transgender cases appear in the top half, lightly shaded. NHS rationing decisions are placed in the lower section and are dark. It can be seen from this analysis that the third potential narrative on wider discrimination/equality does not form an obvious cluster, although it may serve to explain the limited crossover that occurs between the two main narratives in *Condliff*<sup>86</sup> (no. 13), which cites two decisions outside the NHS rationing network in which it predominantly sits. We return to this issue in our discussion of the EHRC's intervention below. It also becomes apparent that the narrative cluster of NHS rationing cases is more densely constituted (or, perhaps better, more closely interdependent) than that relating to transgender rights. A cumulative weight of citations has emerged as cases build on earlier decisions in the NHS rationing cluster, but the transgender cases seem only loosely connected by the citation network. In the latter context, the network of legal actors seems to have played a much stronger role than legal precedent. We therefore consider this form of network in the next section.

## 2. 'Legal' network analysis: personnel

The legal team instructed by the claimant in *AC* had an impressive track record in transgender litigation. In written correspondence, *AC* explained that the solicitor Stephen Lodge had been recommended to her by the (then) Parliamentary Forum on Transsexualism because of his previous experience in related cases.<sup>87</sup> Lodge worked initially for Tyndallwoods Solicitors, specializing in employment and discrimination and public law,<sup>88</sup> and co-founded Public Law Solicitors (PLS) in 2003. There, he promoted the firm's expertise in 'transgender rights',<sup>89</sup> and interest 'in using the law to effect

83 *Cossey*, op. cit., n. 52, represented as A in Figure 1.

84 *Coughlan*, op. cit., n. 81, represented as X in Figure 1.

85 *North West Lancashire*, op. cit., n. 54.

86 *Condliff*, op. cit., n. 78.

87 At the outset, it had seemed likely that Lodge was the relevant solicitor (from comments on Stephanie Harrison QC's website, discussed below). We emailed Lodge to ask if he could comment on the matter of instruction, and although we did not receive a reply from him, we did thereafter receive email correspondence from *AC*, which lies on file with the authors; on ethics approval, see op. cit., n. 68.

88 According to the brief biography provided in this report: In Control, *Don't Be Fooled by the Law* (2009) 21, at <[www.in-control.org.uk/media/7693/don%27t%20be%20fooled%20by%20the%20law%20report.pdf](http://www.in-control.org.uk/media/7693/don%27t%20be%20fooled%20by%20the%20law%20report.pdf)>.

89 <[www.publiclawsolicitors.co.uk/work/transgender-rights/68](http://www.publiclawsolicitors.co.uk/work/transgender-rights/68)>. This text is no longer available online.

social change through the use of test cases<sup>90</sup> based on his involvement in *North West Lancashire*.<sup>91</sup> In 2015, Lodge joined the EHRC following the closure of PLS.<sup>92</sup> Speaking to the media after the decisions of the High Court and Court of Appeal respectively, Lodge emphasized the significance of the decision for transgender individuals.<sup>93</sup>

Stephanie Harrison (claimant's counsel in *AC*) was junior counsel for the claimants in the *North West Lancashire* case<sup>94</sup> and had already established her expertise in transgender rights. In 1996, she co-authored an article for *Legal Action* on discrimination against gays, lesbians, and transgender people in employment contexts,<sup>95</sup> which included comments on the Court of Appeal's decision in *R v. Secretary of State for Defence, ex parte Smith and Grady*,<sup>96</sup> a case in which she was junior counsel for Grady. Together with other lawyers involved in cases seeking equality for lesbian women and gay men, she won the Stonewall Equality Award in 1997,<sup>97</sup> and she contributed to Liberty's amicus brief for *Sheffield and Horsham v. UK*,<sup>98</sup> an important transgender recognition case. She has been Liberty's Human Rights Lawyer of the Year<sup>99</sup> and is on the EHRC's preferred panel of counsel.<sup>100</sup>

90 <[www.publiclawsolicitors.co.uk/about.php](http://www.publiclawsolicitors.co.uk/about.php)>. On 19 June 2015, the firm closed: Legal Action Group, 'Public Law Solicitors Calls It a Day', *Legal Action Magazine*, May 2015, at <<https://www.lag.org.uk/magazine>>.

91 *North West Lancashire*, op. cit., n. 54. See <[www.publiclawsolicitors.co.uk/work/transgender-rights/68](http://www.publiclawsolicitors.co.uk/work/transgender-rights/68)> and <<http://www.publiclawsolicitors.co.uk/about/stephen-lodge-/51>>. This text is no longer available online.

92 <<http://www.publiclawsolicitors.co.uk/about/closure/98>>. This text is no longer available online.

93 BBC, 'Health Transsexuals Win Sex Change Case', 21 December 1998, at <<http://news.bbc.co.uk/1/hi/health/239972.stm>>; BBC, 'Health Landmark Transsexual Ruling Upheld', 29 July 1999, at <<http://news.bbc.co.uk/1/hi/health/407225.stm>>.

94 *North West Lancashire*, op. cit., n. 54.

95 M. Rees and S. Harrison, 'Defending Identity. Gays, Transsexuals and Discrimination' (1995) 26 *Socialist Lawyer* 18, at <<http://www.haldane.org/socialist-lawyer/socialist-lawyer/>>.

96 *R v. Secretary of State for Defence, ex parte Smith and Grady* [1996] 1 All ER 257, CA (discharge from the RAF or Navy on the grounds of sexuality). Ultimately, the European Court of Human Rights determined that both Articles 8 and 13 had been breached; *Smith and another v. UK* (App. nos. 33985/96, 33986/96) [1999] ECHR 33985/96.

97 <[http://www.gardencourtchambers.co.uk/barristers/stephanie\\_harrison\\_qc.cfm](http://www.gardencourtchambers.co.uk/barristers/stephanie_harrison_qc.cfm)>.

98 *Sheffield and Horsham*, op. cit., n. 52. See Liberty's amicus brief *Integrating Transsexual and Transgendered People* (Part 1) (1999), at <<http://www.pfc.org.uk/caselaw/Liberty's%20amicus%20brief%20Part%201.pdf>>.

99 <<http://www.gardencourtchambers.co.uk/stephanie-harrison-qc-wins-liberty-human-rights-lawyer-year-award/>>; <<https://www.liberty-human-rights.org.uk/news/press-releases/liberty-honours-human-rights-heroes-annual-awards-ceremony>>.

100 <<http://www.equalityhumanrights.com/legal-and-policy/commission/panel-counsel>>.

Harrison was instructed as counsel<sup>101</sup> for transgender claimants in *R (C) v. Secretary of State for Work and Pensions*,<sup>102</sup> *A v. Chief Constable of West Yorkshire Police* (where she was junior counsel acting against Sir David Bean QC, the trial judge in *AC*),<sup>103</sup> *North West Lancashire*,<sup>104</sup> and *Chessington World of Adventures v. Reed, ex parte News Group Newspapers Ltd.*<sup>105</sup> In addition to these reported decisions, Harrison's chambers' webpage noted that she was involved in a successful appeal in the first case under the Gender Recognition Act 2004,<sup>106</sup> and that she undertook judicial reviews to challenge health authorities' policies of refusing funding for gender reassignment treatment, including a successful outcome with regard to a full review of the policy of the (now defunct) Health Commission for Wales, with funding being granted thereafter.<sup>107</sup> These latter instructions came from Stephen Lodge,<sup>108</sup> by then at PLS. Therefore, although the citation network linking transgender rights cases with *AC* was quite loose, the personnel network was extremely tight.

The defendant PCT's legal advisors were Bevan Brittan LLP, described at the Health Investor Awards 2017 as 'almost the omniscient legal advisor within the NHS – they appear to be providing legal support to every aspect of NHS transformation and across every area of the NHS. No other firm gets close.'<sup>109</sup> We learnt from a member of the PCT's Priorities Committee that the original counsel proposed to act for the PCT was replaced by David Lock following concerns that the use of a non-health care law expert would be 'risky', and that Lock in turn recommended James Goudie QC as lead counsel.

101 A search conducted on 2 January 2019 for 'Stephanie Harrison' as 'counsel' on Lexis Library generated 249 results, while a 'search within results' for 'transsexual' yielded 39 hits, two of which post-date *AC*. However, a number of these returns were duplicate reports for the same case, and others included cases on entirely different areas but that referenced previous transgender litigation. The term 'transgender' only returned seven hits, all of which were for cases between 2010 and 2017, and thus did not illustrate Harrison's earlier representation in this field.

102 *R (C) v. Secretary of State for Work and Pensions* [2017] UKSC 72, [2017] 1 WLR 4127. Interestingly, earlier in proceedings, Helen Mountfield QC (below) appeared for the claimant: *R (C) v. Secretary of State for Work and Pensions* [2016] EWCA Civ 47.

103 *A v. Chief Constable of West Yorkshire Police* [2004] UKHL 21, [2004] 3 All ER 145; see also [2002] EWCA Civ 1584.

104 *North West Lancashire*, op. cit., n. 54.

105 *Chessington World of Adventures v. Reed, ex parte News Group Newspapers Ltd* [1998] IRLR 56; also reported as *A v. B, ex parte News Group Newspapers Ltd* [1998] ICR 55.

106 We have not been able to locate further details or a report for this decision.

107 <[http://www.gardencourtchambers.co.uk/barristers/stephanie\\_harrison\\_qc.cfm](http://www.gardencourtchambers.co.uk/barristers/stephanie_harrison_qc.cfm)>; see also BBC, 'New Policy on Sex Change Therapy', 23 April 2009, at <<http://news.bbc.co.uk/1/hi/wales/8012981.stm>>.

108 He is also referred to as 'Steve' and 'Steven' on the chambers' webpage.

109 <<http://bevanbrittan.com/expertise/markets/nhs/>>. This text is no longer available online.

Thus, the legal team was assembled in order to have particular expertise in the law relating to NHS rationing.

Goudie is renowned for his expertise in administrative and public law (including co-authoring a key text on judicial review), education, and employment, and has been described as a ‘true guru’ in local government law (and was a former leader of an unnamed London borough).<sup>110</sup> He has been instructed on behalf of various authorities and Secretaries of State,<sup>111</sup> including a significant number of NHS cases.<sup>112</sup> Prior to *AC*, he had links to two other key legal actors: counsel for the intervener, Helen Mountfield QC (see below), and the judge, Sir David Bean QC. Goudie appeared against Mountfield in *Humphreys v. Chancellor, Master and Scholars of the University of Oxford*.<sup>113</sup> In *R (Brown) v. Secretary of State for Work and Pensions*,<sup>114</sup> Goudie acted for the claimant, Mountfield for the intervener. He appeared with Bean in *R v. Secretary of State for Health, ex parte Keen* (both for the applicant),<sup>115</sup> and against Bean in *Rentokil Ltd v. Waite*.<sup>116</sup>

His junior, David Lock (now QC), is a leading practitioner in NHS cases, particularly at the point(s) of intersection with public law. He was a Labour MP and Minister at the Lord Chancellor’s Department (1999–2001), before losing his seat in the 2001 election.<sup>117</sup> He returned to legal practice, heading the health care law team at Mills & Reeve,<sup>118</sup> before moving back to the Bar. He was at No. 5 Chambers until 2014, when he moved to Landmark Chambers, which counts public law among its top three main areas of expertise (‘we are consistently regarded as one of the leading sets ... in Public Law’).<sup>119</sup>

Extra-legally, Lock has a strong track record of involvement with a range of bodies related to health care law. He chaired the Department of Health

110 M. Supperstone et al., *Supperstone, Goudie and Walker on Judicial Review* (2017); <<http://www.11kbw.com/barristers/profile/james-goudie>>.

111 See, for example, *R (Devon CC) v. Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin), (2011) LGR 64; *R (Luton Borough Council) v. Secretary of State for Education* [2011] EWHC 217 (Admin), [2011] LGR 553; *Halo Trust v. Secretary of State for International Development* [2011] EWHC 87 (TCC) (all prior to the Court of Appeal decision in *AC*).

112 A Lexis Library search conducted on 2 January 2019 for ‘James Goudie’ as ‘counsel’ resulted in 394 hits. A search for ‘NHS rationing’ within those results showed no returns; a search for ‘rationing’ gave four hits for *R (W) v. Lambeth LBC* [2002] 2 FCR 289, which is not an NHS case; notably, *AC* was absent. However, Lexis Library categorized 46 hits under ‘health law’, of which 19 were allocated to the ‘NHS’ sub-category, including the otherwise elusive *AC*. Another NHS case in which Goudie was involved is highly significant for NHS rationing decisions: *Coughlan*, op. cit., n. 81.

113 *Humphreys v. Chancellor, Master and Scholars of the University of Oxford* [2000] ICR 405.

114 *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin).

115 *R v. Secretary of State for Health, ex parte Keen* (1990) 10 BMLR 13.

116 *Rentokil v. Waite* (1 February 1985, unreported), CA.

117 <[http://www.landmarkchambers.co.uk/david\\_lock\\_qc](http://www.landmarkchambers.co.uk/david_lock_qc)>.

118 <<http://www.mills-reeve.com/healthlaw/>>.

119 <[http://www.landmarkchambers.co.uk/about\\_us](http://www.landmarkchambers.co.uk/about_us)>.

Legal Working Group on Organ Donation; was a member of the Organ Donation Task Force, and the Department of Health's Expert Panel advising the Secretary of State on EU patients coming to the UK for organ transplants; and has previously served as a non-executive director of the Heart of England NHS Foundation Trust (Birmingham). At the time of writing, he is a member of the British Medical Association's Medical Ethics Committee,<sup>120</sup> and since September 2017 has been a Visiting Professor in Practice at the London School of Economics.<sup>121</sup> He has in the past written blogs on health care law issues for the *British Medical Journal*<sup>122</sup> and set up his own blog on NHS rationing,<sup>123</sup> in addition to establishing and maintaining the GP Law website ('a free of charge guide to the legal rights and obligations of General Practitioners working in the NHS in England'),<sup>124</sup> regularly tweeted on a range of issues (@DavidLockQC), contributed to a key practitioner text,<sup>125</sup> and co-edited the journal *Judicial Review*. Lock's expertise at the juncture of health care law,<sup>126</sup> the NHS, and public law is well established,<sup>127</sup> having appeared on behalf of both PCTs<sup>128</sup> and claimants,<sup>129</sup> and *AC* neatly fits as an episode in his legal career.

We could find no other reported cases where Lock and Goudie have appeared together. This may suggest that although the citation network in relation to NHS cases was more dense, the personnel relationship was looser

120 <<https://www.bma.org.uk/about-us/how-we-work/professional-activities/medical-ethics-committee>>.

121 <<http://www.landmarkchambers.co.uk/news.aspx?id=5012>>.

122 <<http://blogs.bmj.com/bmj/category/david-lock/>>.

123 <<http://nhsrationing.org/>>.

124 <<http://www.gplaw.co.uk/>>.

125 A. Grubb et al. (eds), *Principles of Medical Law* (2010).

126 See, for example, prior to *AC: R (Hussain) v. Secretary of State for the Health Department (acting through the NHS Litigation Authority)* [2010] EWHC 3351 (Admin) (see subsequently at CA: [2011] EWCA Civ 800), and *Tomkins v. Knowsley PCT* [2010] EWHC 1194 (QB) (both concerning dental services contracts with the respective PCT); *Dr A v. Ward and another* [2010] EWHC 16 (Fam) (anonymity of professional witnesses); *R (N) v. Secretary of State for Health; R (E) v. Nottinghamshire Healthcare NHST (EHRC intervening)* [2009] EWCA Civ 795 (legality of total smoking ban at Rampton high security psychiatric hospital); *R (DB) v. Nottinghamshire Healthcare NHST; R (X) v. An NHS Trust* [2008] EWCA Civ 1354 (lawful detention following compulsory admission, s.37 Mental Health Act 1983); the Charlotte Wyatt litigation: [2006] EWCA Civ 529, [2005] EWCA Civ 1181, [2005] EWHC 693 (Fam) and [2004] EWHC 2247 (Fam); *R (B) v. Stafford Combined Court* [2006] EWHC 1645 (Admin), (otherwise reported as *R (B) v. Crown Court at Stafford* [2007] 1 WLR 1524) (disclosure of witness' medical records, Article 8).

127 A Lexis Library search conducted on 2 January 2019 for 'David Lock' as 'counsel' generated 141 hits, of which 92 were automatically categorized by the database under 'health law'; of those results, 39 were in the 'NHS' sub-category. These include cases up to the date of the search, hence the significant decision of *Condliff* (CA), op. cit., n. 78, where Lock represented the PCT, appeared in these results.

128 See, for example, *Condliff* (CA), op. cit., n. 78; *European Surgeries Ltd v. Cambridgeshire PCT* [2007] EWHC 2758 (Admin).

129 See, for example, *R (Bue) v. Worcestershire PCT* [2010] EWHC 1123 (Admin).

than between the transgender rights practitioners. It is possible that the claimant's team's greater concentration of expertise in transgender issues made it more vulnerable should the NHS narrative prevail as it lacked experience in that field. On the defendant's side, the broader public law expertise of Goudie could be said to 'hedge' the risk of the human rights agenda emerging as key in the judge's mind.

### 3. *Conceptualizing the EHRC's intervention*

Like most biographies, the life in question cannot be neatly pigeon-holed, and we needed to consider how to make sense of the intervention from the EHRC in *AC* – in particular, whether it represented a third competing narrative or a strand within the clash that we had identified. The EHRC's mandate is 'to challenge discrimination, and to protect and promote human rights'.<sup>130</sup> It instructed Helen Mountfield QC in *AC* (written submission upon appeal). She had represented the organization on a number of occasions,<sup>131</sup> including in *R (G) v. Nottinghamshire Healthcare NHS Trust*,<sup>132</sup> where David Lock appeared for the NHS trust.

The EHRC works within a statutory, policy, and resource management framework, with a specific budget for strategic litigation, through which its intervention in the *AC* case was funded. Documents obtained following two Freedom of Information requests<sup>133</sup> gave a sense of the narrative of the case constructed by the EHRC. We expected its approach to align with transgender rights. However, the primary issue was portrayed as the 'failure' of the PCT to adequately incorporate its public sector equality duties into their processes:<sup>134</sup> '[t]he Commission's primary interest in this case is in ensuring that the gender equality duty is properly interpreted when developing policies or reaching decisions which affect transgender people'.<sup>135</sup>

The EHRC's written submission to the High Court stated that the PCT should have examined its policies on treatments for gender dysphoria within the framework of an equality impact assessment,<sup>136</sup> and should have included

130 <<http://www.equalityhumanrights.com/about-us/about-commission/our-vision-and-mission>>.

131 A Lexis Library search conducted on 2 January 2019 for 'Helen Mountfield' as 'counsel' resulted in 304 hits. A search for 'Equality and Human Rights Commission' within those results returned 90 hits, whereas a search for 'transgender' yielded seven returns, of which three actually concerned transgender litigation: both *AC* decisions, plus *R (C) v. Secretary of State for Work and Pensions* [2016] EWCA Civ 47 (as noted above, Stephanie Harrison QC appeared for the claimant at the Supreme Court).

132 Also reported as *R (N) v. Secretary of State for Health* and *R (E) v. Nottinghamshire Healthcare NHS Trust*; *op. cit.*, n. 126.

133 EHRC, *op. cit.*, n. 67.

134 Then under s. 76A(1) Sex Discrimination Act 1975 as amended, now see s. 149 Equality Act 2010.

135 Helen Mountfield QC, written submission for the High Court C0/9250/2008, 26 April 2010, para. 4.

136 *Id.*, para. 66.

consultation with ‘all those with relevant experience to offer, whether as service users, service providers, or bodies representative of particular groups, experts or interests’.<sup>137</sup> In an internal paper concerning whether to intervene in the appellate stage of the case, the decision of the High Court was said to have weakened the effect of these public sector duties by finding that the transgender community was too small to mean that consultation with them was required.<sup>138</sup> The EHRC’s written submission to the Court of Appeal claimed that the High Court judge had failed to adequately appreciate the relevant Strasbourg jurisprudence, had a flawed approach to the concept of equality, and had adopted too narrow an approach to the public sector duties.<sup>139</sup> These issues had wider ramifications that were not limited to the position of transgender people. This broader emphasis might be explained by the strategic litigation criteria, which included challenging policies or practices ‘known to cause significant disadvantage based on the number of people or the scale of the disadvantage or injury for the people affected’.<sup>140</sup> It may be that to get the intervention through the EHRC’s internal resource (rationing) processes, it was necessary to construct the case as raising a wider issue. If so, it illustrates the ‘translation’ of a claimant’s situation into a particular legal narrative, in this instance by internal bureaucratic rationing processes and policies.<sup>141</sup>

It is unclear whether AC requested funds for her case. The EHRC did not see itself as supporting AC *per se*: ‘I was going to say to X that we haven’t supported C in the past and we aren’t doing so now – we are intervening which means we are an independent third party’, and in reply, ‘[y]our analysis is correct in that we are advising on the PSDs [public sector duties] rather than supporting C’.<sup>142</sup> It was seeking to enforce legal duties in the abstract.<sup>143</sup> On this approach, an improved assessment process leading to the same outcome for AC would have been regarded as a success. From a transgender rights perspective, that would have been a failure.

Thus, the EHRC’s approach was *primarily* about lawful rationing processes, illustrated by transgender issues, rather than the scope of transgender rights. This conclusion is confirmed by the summaries of the case in the internal

137 *Id.*, para. 74 (see the second paragraph numbered 74 in this document), pp. 27–28.

138 EHRC, Concluded Case Report, Case Ref ME/0409/1472, 23 December 2010.

139 Helen Mountfield QC, C1/2010/1707, 11 February 2011, para. 3.

140 EHRC, Legal Strategy 2008/09 (2008) 10, at <<https://webarchive.nationalarchives.gov.uk/20081105185317/http://www.equalityhumanrights.com/en/publicationsandresources/Pages/LegalStrategy200809.aspx>>. The latest iteration refers to the ‘scale of the problem’, measured by size, severity, persistence, and prevalence; EHRC, *Our Litigation and Enforcement Policy 2019–22* (2019) 4, at <<https://www.equalityhumanrights.com/sites/default/files/our-litigation-and-enforcement-policy-2019-2022.pdf>>.

141 We are grateful to an anonymous reviewer for their observations on this section.

142 EHRC, redacted email exchange, 11 May 2010.

143 s. 30 Equality Act 2006 grants the EHRC the capacity to intervene in legal proceedings that relate to its remit; see Zander, *op. cit.*, n. 31, p. 383.

papers that we obtained from the EHRC. The EHRC case officer focused on the resource allocation question, describing the case as ‘JR [judicial review] of a decision of the PCT to refuse breast augmentation as treatment for gender dysphoria as it was considered to be cosmetic surgery and therefore of low priority for funding’.<sup>144</sup> We note how the discussion is of the medical interventions rather than of the claimant as a person. In an email from the communications team, the facts of the case were summarized as follows:

[T]he PCT has a policy which governs situations in which it will provide state funded breast augmentation surgery. It considers breast surgery as a non-core part of gender reassignment treatment and so sees it as cosmetic. Cosmetic breast surgery is a low priority for funding. The PCT will consider exceptions where there is evidence of significant health impairment. The PCT refused to provide surgery to \*\* (a transsexual person) on the grounds that it was purely cosmetic.<sup>145</sup>

Thus, the key issue for the EHRC was the failure to publish a gender equality scheme that addressed gender reassignment, compounded by the failure of the PCT to carry out an equality impact assessment on its cosmetic surgery policy.

This did not prevent the EHRC from raising arguments that belong to the transgender narrative, but it did suppress their salience. Helen Mountfield QC submitted that for a transgender woman, there was a ‘special need ... visibly to have the secondary sexual characteristics of their assumed gender. ... Those needs are about being read as a woman at all, not the (very different) issue of being happy or unhappy with one’s shape as a woman’.<sup>146</sup> However, this observation was deployed not to argue that there was a right to the medical treatment, but to show that the process by which the PCT regarded transgender status as ‘largely irrelevant’ was unlawful.<sup>147</sup> In its internal paper for the Regulatory/Resources Committee meeting considering whether to intervene in the appeal, the EHRC reiterated that it ‘will not be stating a position on whether the surgery requested should be funded’.<sup>148</sup> That paper also raised for consideration the ‘risk that if the Commission withdraws its involvement at this stage it will undermine our commitment to enforcing the PSDs and to the trans community. The Commission may also be assumed to have accepted the findings of the High Court Judge in respect of the PSDs.’<sup>149</sup> Once again, the risk assessment frames the issues as primarily concerned with making sure that public authorities take seriously their responsibilities to think about equality issues, and the questions about substantive transgender rights are

144 EHRC, *op. cit.*, n. 138.

145 EHRC, redacted email exchange, 9 October 2009.

146 Helen Mountfield QC, *op. cit.*, n. 139, para. 34.

147 Mountfield, *id.*, para. 33, para. 36.

148 EHRC, redacted Regulatory/Resources Committee Meeting paper, ‘Risk Analysis’, p. 2.

149 *Id.*

presented as secondary. On balance, the EHRC's understanding of the case seems to be best conceptualized as a gloss on the NHS rationing narrative.

#### 4. *Summarizing the personnel network*

The idea of placing the case within its legal actors/social structure proved to be an illuminating one. The legal careers of the counsel and instructing solicitors suggest that the teams belonged to strong but discrete networks that were connected by the *AC* case. Our approach enabled us to consider the reflexive dynamics of these processes – the interplay of ideas and people in which narrative framing leads to the assembly of particular alliances of legal actors. These lawyers' involvement in *AC* is a salient feature of the biography of the case. The claimant's team was selected to pursue the case as part of the unfolding narrative of transgender rights, with experience of earlier litigation in the field and a demonstrable commitment to progressing those rights. The defendant's team was selected for its strength on the powers of public authorities, and in particular the integrity of NHS decision making on resource allocation matters. The intervener's counsel adopted a gloss on the rationing narrative, despite the broader human rights perspective. Thus, these represent two separate communities in which narrative meaning is created in the sense identified by Katz et al.<sup>150</sup> and confirmed our sense that explaining the dynamics of the litigation required an understanding of its biographical context.

### THE LITERATURE OF THE LAW

We have drawn on 'paths to justice', network analysis, and archaeological methods to explore how the meaning of *AC* was shaped in the process of litigation. However, this does not capture the case's life following the judgments. Our third line of inquiry examined the interpretation of the case in the literature of the law. Here we sought to establish how cases are placed within a context – which aspects are identified as significant and connected to the development of the law, including the extent to which the case has an ongoing impact (in the literature) following the judicial decision. This introduced two new groups of interpreters: news reporters and law reporters.

The news reporting showed the NHS narrative emerging as dominant, as the dispute was characterized as being about breast augmentation rather than the realization of a gender transition. There was a linguistic shift in the BBC news reporting between the earlier case of *North West Lancashire*<sup>151</sup> and that of *AC*. The headlines for the former case read '*Health: Transsexuals Win*

<sup>150</sup> Katz et al., op. cit., n. 61.

<sup>151</sup> *North West Lancashire*, op. cit., n. 54.

Sex Change Case'<sup>152</sup> and 'Health: Landmark Transsexual Ruling Upheld',<sup>153</sup> regarding the High Court and Court of Appeal rulings respectively. In contrast, the judicial decisions in *AC* were reported under the headlines 'Reading Transsexual to Wait for NHS Breast Op Ruling',<sup>154</sup> and 'Transsexual NHS Breast Operation Refusal Upheld'.<sup>155</sup> The former headlines clearly flagged up the issue of access to gender reassignment surgery as a 'health' matter, and did not specify that it involved the NHS or the type of surgery in question. By contrast, the latter headlines focused specifically on NHS provision, and the precise nature of the intervention; in doing so, there was no indication of the potential need for the 'breast operation' as a *health* issue. The BBC was not alone in this stance. The *Solicitors' Journal* heading 'Transsexual Loses Battle for Bigger Breasts'<sup>156</sup> excluded any health – or indeed rationing – concerns, though the full article was more nuanced.

The position in law reporting was less clear. This is perhaps because the selection of a case by one editor as of interest to their audience does not imply its exclusion from another series. Thus, the narratives are not in direct competition as they are when a judge has to choose between them. Whether a case is included is more a judgement about its significance than its nature. We searched the Westlaw and Lexis Library databases using the case citations for both the High Court and Court of Appeal decisions,<sup>157</sup> noting the findings for 'where reported' (to identify which specialist series had selected it for inclusion). On Westlaw, the High Court decision was categorized by subject as both 'health' and 'human rights', with the following keywords (in order): 'cosmetic surgery', 'funding', 'gender reassignment', 'NHS', 'transsexuals'. In addition to the official transcript, four specialist series picked up the High Court decision: the *Equality Law Reports*,<sup>158</sup> *Medical Law Reports*,<sup>159</sup> *Butterworths Medico-Legal Reports*,<sup>160</sup> and *Administrative Court Digest*.<sup>161</sup> Meanwhile, Lexis Library categorized the case (in order) under 'human rights and civil liberties', 'health law', 'administrative law and judicial review', 'employment and labour law', and 'civil procedure and administration of justice'. The list of keywords provided in the case overview was extensive,<sup>162</sup>

152 BBC, 'Health: Transsexuals Win Sex Change Case', 21 December 1998, at <<http://news.bbc.co.uk/1/hi/health/239972.stm>>, emphasis added.

153 BBC, 'Health: Landmark Transsexual Ruling Upheld', 29 July 1999, at <<http://news.bbc.co.uk/1/hi/health/407225.stm>>, emphasis added.

154 BBC, 'Reading Transsexual to Wait for NHS Breast Op Ruling', 13 May 2010, at <<http://news.bbc.co.uk/1/hi/england/berkshire/8681210.stm>>.

155 BBC, 'Transsexual NHS Breast Operation Refusal Upheld', 11 March 2011, at <<http://www.bbc.co.uk/news/uk-england-berkshire-12713176>>.

156 'Transsexual Loses Battle for Bigger Breasts' (2010) 154 *Solicitors' J.* 5.

157 *AC*, op. cit., n. 15 and n. 41.

158 *Equality Law Reports* [2010] Eq. L.R. 49.

159 *Medical Law Reports* [2010] Med. L.R. 281.

160 *Butterworths Medico-Legal Reports* (2010) 116 BMLR 125.

161 *Administrative Court Digest* [2010] A.C.D. 75.

162 As originally set out: 'NATIONAL HEALTH AND SOCIAL SECURITY' – 'HEALTH AUTHORITY' – 'GENDER IDENTITY DISORDER PATIENT' –

and in addition to the official transcript, three series reports were flagged up: *Butterworths Medico-Legal Reports*,<sup>163</sup> the *All England Digest*,<sup>164</sup> and the *New Law Journal Reports*.<sup>165</sup> This suggests that the case was perceived as having limited significance, given the hierarchy of sources in the *Practice Direction (Citation of Authorities)*.<sup>166</sup>

The Court of Appeal ruling received slightly wider interest and was picked up by the *All England Digest* and *Solicitors' Journal Law Brief*,<sup>167</sup> but the case did not feature in the general series of law reports. It was, however, included in a number of specialist series: *Equality Law Reports*,<sup>168</sup> the two medical law series,<sup>169</sup> *Administrative Court Digest*,<sup>170</sup> and the *Public and Third Sector Law Reports*.<sup>171</sup> This decision was categorized solely under 'health' on Westlaw, with a slight amendment to the keywords used in respect of the High Court decision (that is, 'discrimination' was added and appeared second on the list; 'transsexuals' was replaced by 'primary care trusts'). On Lexis Library, it was categorized under 'health law', 'civil procedure and administration of justice', and 'human rights and civil liberties'; the lengthy list of keywords was largely unchanged, bar the removal of any reference to the Sex Discrimination Act 1975 and Article 8. These changes indicated some subtle shifts in the categorization of the case. In order to consider how the series' editors understood *AC*, we examined the keywords adopted.

We do not wish to overstate the significance of the keywords, not least given the small data set, but some observations can be made. The number of keywords varied enormously, from three (*Equality Law Reports*), to twelve (*Administrative Court Digest*, High Court decision). If we assume, naively, that the initial keyword(s) may be crucial to readers' determination as to the relevance and significance of a case (including whether or not to read it), then the following is worth noting. The keyword 'NHS' was given somewhat greater prominence in the reporting of the Court of Appeal decision, with

'FUNDING FOR BREAST AUGMENTATION SURGERY' – 'CLAIMANT DIAGNOSED AS TRANSSEXUAL SEEKING FUNDING FOR BREAST AUGMENTATION SURGERY' – 'DEFENDANT TRUST REFUSING FUNDING TO CLAIMANT ON BASIS THAT SURGERY NOT CORE PROCEDURAL' – 'WHETHER REFUSAL DECISIONS MADE BY TRUST IRRATIONAL' – 'WHETHER CONTRAVENTION OF DISCRIMINATION LAW' – 'SEX DISCRIMINATION ACT 1975, S 76A' – 'HUMAN RIGHTS ACT 1998, SCH 1, PT I, ARTS 8, 14'.

163 *Butterworths Medico-Legal Reports*, op. cit., n. 160.

164 *All England Digest* [2010] All ER (D) 229 (May).

165 *New Law J. Reports* [2010] NLJR 806.

166 *Practice Direction (Citation of Authorities)* [2012] 1 WLR 780.

167 *All England Digest* [2011] All ER (D) 128 (Mar); *Solicitor's J. Law Brief* [2011] 155(11) S.J.L.B. 31.

168 *Equality Law Reports* [2011] Eq. L.R. 499.

169 *Medical Law Reports* [2011] Med. L.R. 226; *Butterworths Medico-Legal Reports* (2011) 119 BMLR 135.

170 *Administrative Court Digest* [2011] A.C.D. 73.

171 *Public and Third Sector Law Reports* [2011] P.T.S.R. D35.

three of the reports listing it first (as opposed to one for the High Court decision); by contrast, ‘transsexual’ or ‘gender reassignment’ was listed first only once for the Court of Appeal decision (twice for the High Court). Rather anomalously, given that the Court of Appeal determined that it was not necessary to address it,<sup>172</sup> ‘Article 14 ECHR’ appeared first in the *Administrative Court Digest* Court of Appeal coverage, yet not at all in its report on the High Court decision (in which ‘Article 8’ *did* appear, albeit as the twelfth keyword).

It may also be relevant to note that Westlaw ascribes keywords if they are not provided in the original document. For example, the *Solicitors’ Journal Law Brief* summary<sup>173</sup> did not contain keywords, yet six were listed on Westlaw. Unless you check the original documents, the fact that Westlaw represents case summaries in this way is not immediately obvious. At the very least, it means that the categorization exercise undertaken by both series and database editors, described by a representative of Lexis Library as ‘more of an art than a science’, may be influential in the narrative perception of a case post-judgment.<sup>174</sup> However, as many transcripts are now freely available via BAILII (thus arguably reducing reliance on databases such as Lexis Library and Westlaw), and electronic search capabilities within databases in turn reduce reliance on keywords for the identification of materials, the extent to which this classification exercise constrains narratives is unclear.<sup>175</sup>

Finally, there were a handful of case commentaries on *AC*.<sup>176</sup> It has since been noted in passing in a small number of journal articles on public sector equality duties<sup>177</sup> and health care law,<sup>178</sup> and in a range of health care textbooks,<sup>179</sup> but appears to have made no impact on textbooks focused on

172 *AC*, op. cit., n. 15, [58], per Hooper LJ.

173 *Solicitors’ J. Law Brief*, op. cit., n. 167.

174 Email correspondence, 13 October 2015, on file with the authors.

175 We are grateful to John Coggon for this point.

176 High Court: ‘National Health Service: Health Authority – Gender Identity Disorder Patient’ (2010) 98 *Human Rights Updater* 14; ‘Resource Allocation in Healthcare’ (2010) *Personal Injury Compensation* 8; ‘Transsexual Loses Battle for Bigger Breasts’, op. cit., n. 156. Court of Appeal: ‘National Health Service: Health Authority – Gender Identity Disorder Patient’ (2011) 105 *Human Rights Updater* 6; ‘Resource Allocation: Decision on Gender Dysphoria Policy’ (2011) *Personal Injury Compensation* 9; ‘Judicial Review: Refusal to Fund Breast Augmentation Surgery for Transsexual’ (2011) *Public Law* 630; ‘Hooper LJ Warns “All Choice Involves Discrimination” (2011) 155 *Solicitors’ J.* 5.

177 S. Fredman, ‘The Public Sector Equality Duty’ (2011) 40 *Industrial Law J.* 405; T. Hickman, ‘Too Hot, Too Cold or Just Right? The Development of Public Sector Equality Duties in Administrative Law’ (2013) *Public Law* 325; A. McColgan, ‘Litigating the Public Sector Equality Duty: The Story So Far’ (2015) 35 *Oxford J. of Legal Studies* 453.

178 Ford, op. cit., n. 49; P. Lewis, ‘The Medical Exception’ (2012) 65 *Current Legal Problems* 355.

179 M. Brazier and E. Cave, *Medicine, Patients and the Law* (2016) 58; J. Herring, *Medical Law and Ethics* (2017) 74–75; E. Jackson, *Medical Law, Text Cases, and*

public law/equality.<sup>180</sup> Thus, the extent to which *AC* has proved influential in shaping the legal literature on the narratives identified at the outset seems largely limited to the rationing context. In the legal literature, the tale of the NHS rationing citadel quickly became dominant, a point also apparent from the citation network (see Figure 1).

## CONCLUDING REMARKS

Our interest in case biographies was partly prompted by the way in which legal texts tend to suppress extra-legal stories and limit our understanding of the various meanings of cases. Protagonists' autobiographical accounts may provide insights that illuminate and explain both planned and serendipitous aspects of litigation, and the broader context within which it sits (as viewed from their perspectives, at least). However, these texts are the exception rather than the norm. Furthermore, they rarely address legal arguments – and even when such matters are explicitly reflected upon, there may be considerable dissonance between what is highlighted as noteworthy by the protagonists and what makes its way into the formal law reports.<sup>181</sup> Consequently, the available legal and non-legal accounts of litigation rarely connect the discourses together, and thus it is hard to understand how they may inform and influence each other. Our case study of *AC* set out to establish whether a biographical approach to studying litigation might reveal richer insights into the process by which legal norms are produced. We drew on the approach of 'paths to justice' studies to explore how the *AC* dispute became a legal case and showed how a contest emerged between competing narratives to provide an account of what sort of legal dispute was involved. While the depth of our analysis was limited due to the pilot nature of our study, drawing on material in the judgments and correspondence with the claimant, it was sufficient to show that there was more going on than the translation or transformation of a lay dispute into legal categories and terminology.<sup>182</sup> This was not merely a matter of addressing unmet 'legal need',<sup>183</sup> as the 'need' in question was only defined through the litigation process (which was far more complex than could be discerned solely from reading the judgments).

*Materials* (2016) 83; G. Laurie et al., *Mason and McCall Smith's Law and Medical Ethics* (2016) 413.

180 There is no mention in T. Endicott, *Administrative Law* (2018); P. Leyland and G. Anthony, *Textbook on Administrative Law* (2016); A. Le Sueur et al., *Public Law, Text, Cases, and Materials* (2016); J. Stanton et al., *Public Law* (2018); J. Wadham et al., *Blackstone's Guide to the Equality Act 2010* (2017).

181 On the co-existence of 'legal processes and cultural production' and the muted boundaries between 'law and its afterlife', see K. Biber, *In Crime's Archive: The Cultural Afterlife of Evidence* (2018) 7, 146–147, 196.

182 As explored by Felstiner et al., *op. cit.*, n. 21.

183 Pleasance and Balmer, *op. cit.*, n. 3.

To understand the life story of the case, it was necessary to uncover the mechanisms by which the possible narrative frames for the dispute competed with each other, and how one came to prevail. We deployed approaches from legal archaeology to piece together one aspect of this process: the emergence of an intervention by the EHRC. Internal documents showed how the intervention was premised on the grounds of public sector duties, which in turn added to the impetus for the NHS rationing narrative to become dominant. This assisted our understanding of the origins of the case but not its meaning in the development of the law.

Next, we examined how the two main competing narratives fitted into the patterns that could be discerned in the body of law that is constituted by legal judgments. Mapping the citation network revealed that the *AC* decision was a node that connected distinctly different networks, which otherwise had no significant overlap between them. We analysed the connections between legal personnel engaged with *AC* and the other cases in this web of legal decisions and saw a high degree of overlap, identifying another dimension of the networked nature of legal practice. This suggests the way in which the life of a legal decision is shaped by the biographies of lawyers as well as of parties. In a common law system, the ‘meaning’ of a case is not fixed at the time but emerges through future analysis. The doctrine of precedent is used to explain how judicial analysis approaches this. However, most cases, like *AC*, are rarely cited in court. Bearing this in mind, we explored how the case was characterized in legal literature, including reports and commentary, and discovered that the same contest between the two main competing narratives could be identified in this arena too.

Our case biography of *AC* shows how the choice of competing narratives began to take shape long before the issue was argued before a judge. The divergence between the transgender rights narrative and the NHS resource allocation narrative was manifest in the process by which the legal teams came together. The judicial consideration was thus less an interpretation of a dispute within a common frame of reference and more a selection of which framework was to prevail. This analysis also shows how it is not possible to give a satisfactory account of how choices are made between possible competing narratives without locating the court action in its wider contexts. We have looked at the position of *AC* as a node in the history of legal doctrinal development, an episode in the biographies of legal personnel, and a subject for discussion in the literature of the law. However, inevitably, there will be other ways of understanding the context – for example, by considering the place of cases in the lives of litigants as individuals. Furthermore, there are alternative biographies to be explored.

Legal cases are complex social phenomena. They have histories, linking past and future events in a present encounter. They have protagonists, whose lives intersect at a point in time. They have particular modes of existence, shaped by legal procedures, serendipitous conjunctions of opportunity and desire, availability of funding, and ambiguities of advice that are seen to

suggest litigation rather than settlement. The doctrinal legal meaning of a case is usually judged according to a set of institutional rules: essential conclusions (*ratio decidendi*) or incidental comments (*obiter dicta*), its place in a hierarchy of courts, or a line of precedents, its awareness of applicable rules (as in the *per incuriam* doctrine for limiting the authority of decisions).<sup>184</sup>

The meaning of the case to participants may, however, be different. For the parties, there may be little more at stake than the resolution of a specific dispute, unconnected with the wider currents of the law or life in society. Alternatively, they may view the case as part of a campaign – possibly a legal one, but perhaps of a different character altogether. They may see themselves as ‘representative’ and the case as raising wider concerns than those invoked by the immediate dispute. In the field of health care law, Diane Blood’s recourse to court in order to be able to have her deceased husband’s children<sup>185</sup> seems to have a different sort of biographical context to the drive of campaigners such as Josephine and Bruno Quintavalle, and Comment on Reproductive Ethics, to resist the deployment (by others) of assisted reproductive technologies.<sup>186</sup> The former is a story of personal tragedy; the latter is more a history of the fight for (and against) certain social values.

Our case study draws attention to significance of the fact that the lawyers involved have careers, in which the case will play a part and by which it might be influenced. Two factors of potential interest emerged from our desk-based research. The first was the significance of the ways in which groups of lawyers, solicitors’ firms, and barristers’ chambers increasingly seek to create a ‘brand’ through specialization, which is aimed at boosting both reputation and profitability.<sup>187</sup> The second interesting dimension concerned the possibility that political allegiances might have played a role in the case.<sup>188</sup> The defendant’s legal team and the High Court judge had Labour Party connections,<sup>189</sup> although this line of inquiry might also turn out to be a distraction.<sup>190</sup>

184 For a classic account of the traditional doctrine of precedent (*stare decisis*), see R. Cross and J. W. Harris, *Precedent in English Law* (1991); and more recently, Zander, *op. cit.*, n. 31, pp. 208–293.

185 *R v. Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 WLR 806; Blood, *op. cit.*, n. 8.

186 *R (Quintavalle and CLC) v. Human Fertilisation and Embryology Authority and others* [2008] EWHC 3395 (Admin); *R (Quintavalle) v. Human Fertilisation and Embryology Authority* [2005] UKHL 28, [2005] 2 A.C. 561; *R (Quintavalle) v. Secretary of State for Health* [2003] UKHL 13; [2003] 2 A.C. 687; <<http://corethics.org/>>.

187 See Montgomery et al., *op. cit.*, n. 47, pp. 366–371. Thanks also to Karen Morrow for this point.

188 See further J. A. G. Griffith, *The Politics of the Judiciary* (2010).

189 We observed a number of connections to the Labour Party. David Lock’s association was highlighted above and David Bean is a long-standing member. Although we did not find any formal statement of the other legal actors’ political affiliations (if any), we also note that James Goudie is married to the Labour peer, Baroness Goudie.

190 See Zander, *op. cit.*, n. 31, Chapter 7.

Thus, it is clear that there are numerous biographical stories that connect to specific cases. It is less obvious how, or indeed whether, these different fields of meaning are connected with each other. However, it is valuable to try to understand this possibility better and the case biography method offers a mechanism to integrate these different aspects to make sense of the bigger picture, and to demonstrate if and how it all connects together. Biographies tell a story about their subjects that gives coherence to their identity, while acknowledging the influences upon them and the possibilities of having taken different paths, and draws out the impact that they have on others. We have shown how the identity of *AC* developed as a case on NHS rationing, from amongst the other possibilities, through a process of interactions analogous to those of a human life. That identity cannot be properly explained without a rich understanding of the context, but a description of the context that does not acknowledge the discrete and distinct character of the case would be inadequate.

The path by which *AC*'s desire for surgery mutated into the decision in *AC* is important, but her personal frustration is only one dimension of the way in which the case was shaped.<sup>191</sup> Archaeological analysis of *AC* reveals how issues emerged and became refined as a particular type of dispute as the case proceeded through the courts. It illuminates the processes but tells us little about the significance of the case. For that, we need to appreciate the complex web of connections that link it with other lives, values, and legal doctrine. This is the essence of a biographer's task. The idea that cases have lives is certainly a projection of our desire to make them meaningful; cases do not make choices about their identities in the way that people do. However, biographers know that their selection and interpretation of the material about their subjects involves the creation of identities, not merely description. Their discipline of being true to the data available to them is similar to our task of telling the story of what a case means with due regard to its doctrinal, historical, social, and political contexts. A biographical account of a case enables these disparate strands to be woven together to constitute an story worth telling as a whole, not merely as part of the narratives of others.

191 *AC*, op. cit., n. 15, [6]; *AC*, op. cit., n. 46.