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## FOREWORD

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Sasha Boutilier and Victoria Wicks  
Editors-in-Chief, *Mindful*

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We are delighted to present the eighth edition of *Mindful: Journal of Ethics, Society, and Law*. This year's issue is divided into three sections which address contemporary issues in applied and theoretical ethics in Canada and the world. Section One examines issues surrounding immigration and refugees. Sierra Gregoris' essay examines education inequalities in Canada's immigration system. Anah Mirza's essay raises important ethical issues concerning Canadian refugee policy.

Section II features inter-disciplinary perspectives on new and emerging ethical issues in health and science. Janna Maier provides a nuanced discussion of ethical issues surrounding CRISPR-9 genome editing. Amitpal Singh examines the issue of complicity in physician-aid-in-dying. Finally, Adrienne Row-Smith offers a compelling critique of commodification of gender-reassignment surgery.

Section III examines questions of law and moral theory. Ben Fickling examines the legality of the United States' killing of Osama bin Laden, raising important issues concerning the status of targeted killing in international law. Benson Cheung's contribution provides a compelling discussion of Rousseau and Mill's inter-dependency in their ideas of freedom.

We would like to thank Professor Simone Weil Davis for agreeing to be interviewed and for the insightful comments she shared with us. We would also like to express our sincere thanks to all those who have made this edition of *Mindful*, particularly our contributors and editorial board.

Finally, we would like to thank our faculty advisor Professor John Duncan for his guidance and support throughout preparing this edition of *Mindful*.

## Imagining Together: An Interview with Prof. Simone Weil Davis

**Simone Weil Davis** is assistant director of Ethics, Society & Law; she also teaches in the ES&L and Trinity One programs. In 2010, Simone brought the Inside-Out Prison Exchange Program model up to Canada, which brings incarcerated and campus-based students together as classmates, and went on to help **Walls to Bridges** emerge as a national Canadian pedagogical program. She is a mother, a sister, and a daughter. Her publications include *Living Up to the Ads: Gender Fictions of the 1920s* (2000), "Loose Lips Sink Ships," (*Feminist Studies* 2002), the co-edited *Turning Teaching Inside-Out: A Pedagogy of Transformation* (Palgrave 2013) and "Imagination Practices and Community-Based Learning" (forthcoming 2017).

**Sasha Boutillier:** Would you mind telling us a little bit about yourself, your background, and your work?

**Simone Davis:** From age 16 to 26 I self-identified as an actress (which meant that I was also a waitress). Acting was my way of responding to the love I felt for literature, to engage with it in a really direct and performative way. And I'm sure the ham-iness of my acting years came right along with me into my life as a teacher. I got my PhD in English from UC Berkeley and I've been teaching in a university setting since 1991. I launched off from English into interdisciplinarity pretty much immediately, embracing cultural studies and feminist analysis. I had the opportunity to teach feminist theory at New York University in a graduate program there and I taught in the English Department at Long Island University. I had some very happy years at Mount Holyoke College, also in the English Department.

While I was at Mount Holyoke as a visiting associate professor, this was in the 2000's; I became very engaged in working with prison education. Prior to that time I focused as a scholar on trying to read and understand commodity culture—how people wrestle with it, how people are shaped by it. I placed my work historically, focusing in particular on the 1920s -- which was the decade when the advertising industry really took off with a *boom!* I was working on the way that gendered and racialized subjectivities were being shaped by and resisting commodity culture. So that seems pretty far away from where my work is today, but the link may be that place where social structures and individual experience converge. Instead of asking questions about commodification, today I'm often thinking about criminalization, prisons, and all the institutions around crime and punishment, the way they impact people's sense of themselves and their sense of what's possible—the way they're functioning to keep society on a certain track, to keep certain dominant relations in place. I got training in 2005 from the Inside Out Prison Exchange Program. The training took place in a maximum security prison in Philadelphia. My trainers were primarily men who were incarcerated there serving very long sentences who had been working for years on the Inside Out pedagogy model. It was a life-changing week.

**Sasha Boutilier:** Building on that, if you could just tell us a bit about what you're really excited about in your current research or teaching?

**Simone Davis:** I stay very involved with pedagogy and community-based learning. Here in Canada I am working with something quite close to the Inside-Out model, which brings together incarcerated students and students from universities or colleges as classmates in postsecondary courses that are really oriented towards dialogue and collaboration and whole-self learning. I took that model with me when I came back to Canada in 2009. I met some amazing collaborators here (in and out of prison), especially Shoshana Pollack, and we developed an autonomous, national Canadian program, Walls to Bridges. We're propagating that kind of pedagogy here and creating opportunities for people in prison and people outside of prison to study together and engage in collaborative learning. So that's something I'm bringing in a somewhat modified form to the University of Toronto starting in January.

I'm really interested in the things we learn through community-based learning. It's an opportunity for everyone involved to strengthen our imaginations. One of the things I believe most profoundly is that we need desperately right now to develop our imaginations—so we can think beyond the status quo—and that might be, in some ways, the most important work we need to be doing. I'm not just talking imaginative individuals with bright ideas and innovations—we've got a lot of that! The work I think is most sorely needed is to imagine *together*, to learn how to be together, and to share learning relationships that are built around helping each other thrive. I feel that's where our imaginative capacity can grow and must grow. That's really the heart of my commitment to pedagogy and community based learning; that's where it's rooted.

**Sasha Boutilier:** Thinking of this idea of the university building new relationships and really reaching out to the community and facilitating that, do you see a lot of barriers when you try to do that from the university bureaucracy? What do you think universities could do to try to make that easier for people?

**Simone Davis:** I see a lot of efforts to try to put that in place. There are institutional barriers to overcome; they aren't necessarily due to people having ill-will towards the notion of community-based learning. I think people largely embrace the notion. But there are some encrusted traditions in place—ways of practicing and approaching education—that tend to privilege certain kinds of knowledge, certain kinds of wisdom, certain kinds of approaches to what expertise looks like and feels like. There are also leftover notions that you can see stemming back to 19<sup>th</sup> century ideas of philanthropy as salvation and what it means to be a “helper” or a “helpee.” Moving beyond those notions and blind spots to embrace all sorts of knowledge and to actually be ready to find new ways of incorporating—not just incorporating but also

really opening up to—other sources of wisdom is essential. That sounds airy-fairy but I think there are explicit structural ways to put those changes in place.

**Sasha Boutilier:** I guess that's very relevant to everything going on around the place of Indigenous knowledge in the university as well.

**Simone Davis:** Absolutely right. Indigenous peoples both in and outside the university setting are speaking brilliantly about what some colleagues call "Indigegogy." It's urgent that everyone listens.

**Sasha Boutilier:** How would you say your background in the arts and literature colours your current work on prisons and incarceration?

**Simone Davis:** I think that there are places the arts can go in terms of shaking loose our framing assumptions, such as the concepts that fuel criminalization, all those storylines and structures of thought that put people into cubbyholes and that allow oppression, power and privilege to unfold the way they do. All of those kinds of conceptual rigidities can be shaken loose by creative expression and connection. I think it's especially obvious when you engage with people who are themselves facing confinement. People who are incarcerated can find the most incredibly innovative ways to make sure they can stay expressive, even when it's being stripped from them by the contexts they are navigating. But more generally, too, that hunger to express can be so emancipatory, especially if we can also learn to *listen* across the boundaries that divide us.

**Sasha Boutilier:** Moving back to Walls to Bridges, where do you see that going next?

**Simone Davis:** There's a network of people now who have received the training and many of them are starting to generate their own courses in men's and women's facilities, in prisons, in jails. So the course I'll be running here will be working with people who have served their sentences and are reintegrating back into their community. There's another course that ran recently out of the University of Waterloo that brought together university students and people in a therapeutic community who were working with addiction issues. This model of co-learning and bringing whole-self learning to the university seminar can work in other contexts. I also want to mention the Walls to Bridges Collective—it's a group of alumni and instructors—people who have taken one course or who have been trained in the method. One circle of that Collective meets in Grand Valley Institution, a women's federal prison in Kitchener. Another circle of the Collective is Toronto-based. We offer trainings, workshops, and consciousness-raising work around alternative pedagogies and criminalization issues. These alumni groups are great because they mean that the relationships don't just end after a single semester course, but that we can keep building on and developing the solidarity that people often experience in the course of the class.

## SECTION 1: IMMIGRATION & REFUGEE POLICY

### Educational Inequality in Canada's Immigration System

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Sierra Gregoris

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Education is one of the most important criteria for achieving success across multiple aspects of Canadian life, ranging from career opportunities to financial success. If Canada is to become a truly culturally diverse country with the promise of equal rights for all it is important to recognize cultural differences in levels of, and access to, education. This paper argues that Canada's points system for immigration is inherently discriminatory due to its emphasis on educational qualifications, which contain implicit inequalities which adversely impact those who have limited access to formally recognized education. States are not morally justified in discriminating based on characteristics such as gender, race, and social class, yet the points system does so when it emphasizes educational skill. Although Canada is one of the few countries that has taken preliminary steps to mend the gaps that educational criteria create, this paper concludes that there remains much more to be done in order to create a more liberal discretionary immigration regime.

The Canadian immigration system is a points-based system. This system "assesses all immigrants on the same skills-and training-related criteria", and allows applicants to accumulate points based on certain categories, such as levels of education, age, and knowledge of official languages.<sup>1</sup> An immigrant is defined as a person who has permanently settled in another country that is not their birth country.<sup>2</sup> Of the immigrants who desire to move to Canada, only the independent immigrants—i.e., those who are not seeking asylum, refuge status, or family reunification—are explicitly assessed on the points system.<sup>3</sup> In what follows, reference is made to the Canadian Charter of Rights and Freedoms in order to argue that the current immigration regime defies core liberal values that are embodied in the Charter. The recent emphasis placed on educational criteria in Canada and other Western countries is correlated with the rise

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<sup>1</sup> Abu-Laban, Yasmeen, and Christina Gabriel. *Chapter Two: Immigration and Canadian, Citizenship. Selling Diversity: Immigration, Multiculturalism, Employment Equity, and Globalization*. Peterborough: Broadview Press Ltd., 2002. 37-60. Print. 43.

<sup>2</sup> "Refugees and Immigrants: A Glossary." *Canadian Council for Refugees*. Sept. 2010. Web. 26 Feb. 2016. <http://ccrweb.ca/en/glossary>

<sup>3</sup> Abu-Laban and Gabriel 44.

of the 'global war for talent.' Increasingly, each country competes to attract and obtain the most intelligent and highly skilled immigrants to serve its economic priorities.<sup>4</sup>

In order to qualify for immigration under the points system, individuals need a minimum score of 67 out of 100, 25 of which are assessed on the education criteria, making it crucial.<sup>5</sup> While Canadian immigration has not always been explicitly geared toward educational skill, scholars have noted that from its inception, the immigration policy has been heavily tied to economic criteria and needs.<sup>6</sup> Today, this has led to the emphasis on education qualifications because "it is assumed that the more skills and credentials one has, the more productive one becomes".<sup>7</sup> This is primarily because there are prevalent expectations that skilled immigrants will bolster national economic competitiveness.<sup>8</sup> However, it is strikingly ironic that the average Canadian today would not qualify for residence based on the immigration standards; only 18-26 percent of Canadians meet the education requirements for immigration.<sup>9</sup> Moreover, while it is morally justifiable that states should be able to assess and accept immigrants based on certain discretionary bases, the latter are not justified if they involve explicit or implicit discrimination. The emphasis placed on educational qualifications and credentials is implicitly discriminatory against those who do not have access to formally recognized education. Essentially, because points are awarded on the basis of formal skills and education, the system favours the "high-skilled" work typically performed by men.<sup>10</sup> Thus, Canada's immigration regime is discriminatory to a fault.

It is clear that education qualifications imply a level of skill or talent based on the knowledge of the immigrant applicant. This notion of skill or merit is in itself arbitrary and problematic. According to the

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<sup>4</sup> Brown, Phillip, and Stuart Tannock. "Education, Meritocracy, and the Global War for Talent." *Journal of Education Policy* 24.4 (2009): 377-92. Google Scholar. Web. 26 Feb. 2016. <http://www.tandfonline.com/doi/abs/10.1080/02680930802669938>, 381.

<sup>5</sup> Ahmad, Tariq. "Points-Based Immigration Systems: Canada." Law Library of Congress, Mar. 2013. Web. 23 Mar. 2016. <http://www.loc.gov/law/help/points-based-immigration/canada.php#recent>.

<sup>6</sup> Abu-Laban and Gabriel 37.

<sup>7</sup> Brown and Tannock 378.

<sup>8</sup> Tannock, Stuart. "Points of Prejudice: Education-Based Discrimination in Canada's Immigration System."

*Antipode* 43.4 (2011): 1330-56. Google Scholar. Web. 29 Jan. 2016.

<http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8330.2010.00864.x/abstract?systemMessage=Wiley+Online+Library+will+be+unavailable+on+Saturday+27th+February+from+09%3A00-14%3A00+GMT+%2F+04%3A00-09%3A>, 5.

<sup>9</sup> Bauder, Harald. "Equality, Justice, and the Problem of International Borders: The Case of Canadian Immigration Regulation." *An International E-Journal of Critical Geographies* 2.2 (2003): 167-82. Google Scholar. Web. 05 March. 2016. 171.

<sup>10</sup> Abu-Laban and Gabriel 51.

World Bank, skill is equivalent to tertiary education<sup>11</sup> yet there are many different abilities and skills that are not all valued equally. Therefore, ability is itself not a class neutral concept, because the notion of skill is class-based as well.<sup>12</sup> Moreover, because terms like skill and ability are problematic, they lead to further inequalities in the immigration application system. For example, scholars have noted that “measurements of skill tend to disregard skills learned in the home or community and focus on skills learned in formal educational settings”.<sup>13</sup> Research shows that globally, women face extensive disadvantages in opportunities for the education and work practice that is compulsory to meet the points test.<sup>14</sup> This, in turn, leads to the exclusion of most women from countries where they have limited access to skilled education (even though they gain skills within the domestic realm). Furthermore, individuals who come from lower socioeconomic classes, along with minority groups, do not have equal access to higher levels of education in their home countries, or are not allowed to gain these credentials based on their gender.<sup>15</sup> Thus, while education-based immigration may not initially seem discriminatory, it leads to forms of differential exclusion based on race, gender, and class. The rise of significant emphasis on qualifications in Canada is affected by the changes resulting from globalization, which encourages Canada to rely on education, despite its many consequences.

Education-based immigration systems are correlated with the emergence of global competitiveness for the highly intelligent, which has negative implications for education and knowledge globally. Essentially, the ‘global war for talent’ presumes that if national prosperity requires maximizing global competitiveness, then nations must maximize their share of knowledge-economy jobs by recruiting and maintaining the world’s smartest and most talented individuals, which is done via state immigration policies.<sup>16</sup> This promotes a winner-take-all situation, where education is no longer a public good, but becomes a ticket to success for some individuals because of their access to education.<sup>17</sup> With respect to the global competition for the world’s most talented, Canada is a knowledge-based economy in competition with

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<sup>11</sup> Boucher, Anna, and Lucie Cerna. "Current Policy Trends in Skilled Immigration Policy." *International Migration Review* 52.3 (2014): 21-25. Google Scholar. Web. 26 Feb. 2016. <http://onlinelibrary.wiley.com/doi/10.1111/imig.12152/abstract?systemMessage=Wiley+Online+Library+will+be+unavailable+on+Saturday+27th+February+from+09%3A00-14%3A00+GMT+%2F+04%3A00-09%3A00+EST+%2F+17%23>.

<sup>12</sup> Tannock 8.

<sup>13</sup> Tannock 7.

<sup>14</sup> Boucher, Anna. "Skill, Migration and Gender in Australia and Canada: The Case of Gender-Based Analysis." *Australian Journal of Political Science* 42.3 (2007): 383-401. Google Scholar. 28 Feb. 2016. Web. <http://www.tandfonline.com/doi/abs/10.1080/10361140701513547>, 392.

<sup>15</sup> Tannock 7.

<sup>16</sup> Brown and Tannock 381.

<sup>17</sup> Tannock 11.

other developed countries. This has led to a calibration and stratification of “desirable” knowledge.<sup>18</sup> For example, from 1986 to 1997, Canada’s inflow of computer scientists increased 15-fold, its flow of engineers increased 10-fold, and its flow of natural scientists increased eight-fold.<sup>19</sup> It is through trends and processes like these that education has come to be seen as a mere commodity, and not a public good.<sup>20</sup>

However, some scholars appeal to ideas of national interest and sovereignty, on the basis of which they disagree that states are morally unjustified in using educational criteria as a discretionary basis for immigration admission. For some, the use of educational criteria and the differential valuation of skills are legitimate and do not constitute any negative discrimination.<sup>21</sup> For example, scholar Joseph Carens claims that states are morally justified in using such discretionary criteria in deciding whom they let into their country as a matter of national interest, so long as it does not discriminate upon recognized grounds.<sup>22</sup> Furthermore, he argues that education is a morally permissible criterion of selection because in most cases, it does not raise issues of justice.<sup>23</sup> Likewise, scholars maintain that immigration policy-making is not about morals per se, but is politically defined by national interests and values, and thus there should be precise rules as to who qualifies for what.<sup>24</sup> Thus, weighing education criteria heavily is not negatively discriminatory, but is realistic and justified for the well-being of the state.

While it is acceptable that a country act in its own self-interest, considering the needs of its citizens and the state as a whole, issues arise when national self-interest comes to unfairly disadvantage other humans and reduce their life chances because of their gender, class status, or the opportunities with which they are presented. Importantly, there is no valid difference between policies that discriminate based on gender and ones that discriminate based on race.<sup>25</sup> Scholars have noted that policies and their implementation should be based upon principles that individuals see as being fair, even though incorporating morality into

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<sup>18</sup> Boucher and Cerna 23.

<sup>19</sup> Brown and Tannock 382.

<sup>20</sup> Johnstone, Marjorie. "Branded: International Education and 21st Century Canadian Immigration, Education Policy, and the Welfare State." *International Social Work* 57.3 (2014): 209-21. *Google Scholar*. Web. 26 Feb. 2016. <http://isw.sagepub.com/content/57/3/209.short>.

<sup>21</sup> Tannock 2.

<sup>22</sup> Carens, Joseph. "Who Should Get In? The Ethics of Immigration Admissions." *Ethics and International Affairs* 17.1 (2003): *Google Scholar*. Web. 25 Jan. 2016. <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7952120&fileId=S0892679400002938>, 104.

<sup>23</sup> Carens 137.

<sup>24</sup> Weiner, Myron. "Ethics, National Sovereignty and the Control of Immigration." *International Migration Review* 30.1 (1996): 171-97. *Google Scholar*. Web. 20 March. 2016. [http://www.jstor.org/stable/2547466?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/2547466?seq=1#page_scan_tab_contents), 193.

<sup>25</sup> Boucher 386.

public policy and immigration systems often involves making challenging choices among differing values.<sup>26</sup> Former Immigration Minister of Canada, Elinor Caplan, stated that it is in Canada's interest to recruit the best and the brightest, as we are competing with the rest of the world for these individuals.<sup>27</sup> However, some scholars oppose the implications of this line of thinking, claiming that education should never be used as a screening tool, for it could deny equality in political, civil, or social welfare rights and protections.<sup>28</sup> In Canada, the education criteria has risen steadily over the years, so that the points system now only accepts those with a minimum of one year technical work, professional or managerial experience, with the result that education becomes a tool of exclusion and separation.<sup>29</sup> Thus, while states do have moral justification to meet the needs of their changing economies and to implement policies geared toward these needs, the inequality that arises from this education qualification gap is ethically impermissible.

The inequality that arises from Canada's participation in the competition for the most talented individuals goes against fundamental and traditional liberal democratic principles of equality of opportunity and freedom of movement. It has been posited that Canada, as a Western democracy, claims to adhere to a liberal project in which it is committed to ensuring the moral equality of all individuals, regardless of difference.<sup>30</sup> Yet, this fundamental liberal principle "is at odds with immigration policy, which is by definition exclusionary and...openly violates universal ideas of equality".<sup>31</sup> The Canadian Charter of Rights and Freedoms is meant to represent liberal democratic values in Canada. For example, all Canadians are afforded equal rights, including equality of opportunity, in virtue of being equal human beings. While the Charter does not apply to potential immigrants, it still embodies values that Canada posits to share and pursue. However, if the Canadian immigration regime is founded upon inherent discrimination based in education, which disadvantages many women and individuals with minimal access to formal education, then this seems to directly contradict the country's Charter-enshrined values. Furthermore, if Canadians are committed to the idea of education as a collective public good that ought to benefit all, then we cannot accept education as a tool of exclusion or an escape ticket.<sup>32</sup>

Canada's Skilled Worker Program is further indication of the inequalities that lie within the current immigration regime. The Skilled Worker Program also follows a points-based system considered to be

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<sup>26</sup> Weiner 194.

<sup>27</sup> Bauder 172.

<sup>28</sup> Tannock 16.

<sup>29</sup> Tannock 4.

<sup>30</sup> Bauder 170.

<sup>31</sup> Bauder 170.

<sup>32</sup> Tannock 16.

objective and transparent, designed to attract immigrants “who show promise of being able to join in and contribute” to Canada.<sup>33</sup> Federal skilled workers are required to have foreign credential assessments to determine the value of their education to Canadian employers before they arrive, allowing for a faster and more efficient process. It is argued that the program “scans people for their education and skills”—“only people with large amounts of human capital are allowed into Canada”.<sup>34</sup> This type of high-skilled immigration policy systematically separates out and selects those individuals who have been able to benefit from equal access to education, and recruits them to Canada.<sup>35</sup>

Despite the problems embedded within its immigration regime, Canada is one of few countries that has taken positive preliminary initiatives to recognize and amend such problems. For example, Canada, following the enactment of its new immigration act in 2002, moved from a specific skills test to a more general test, while Australia maintains a specific skills test.<sup>36</sup> While a general model is still not free of discrimination, this change for Canada is nonetheless a positive step that may in fact have gender-positive outcomes by removing uncertainties over changing skills lists.<sup>37</sup> Moreover, the implementation of credential assessments constitutes a positive movement forward. While fair assessment of credentials has been regarded as a challenge that may create a transferability gap, there are benefits to its implementation.<sup>38</sup> This gives individuals a sense of what to expect when applying for information because they can assess their credentials beforehand. It resolves the issue of immigrants landing in Canada and then finding out that their credentials are not equally valued, which may temper expectations.<sup>39</sup> Canada’s Foreign Credential Recognition program was created to provide a strategy for federal departments to work together to address the barriers that internationally trained individuals face; over six years, 68 million dollars has been distributed to various initiatives resulting from this.<sup>40</sup> However, credential assessment remains unfair in its valuing of different skills and talents. Thus, while there is evidence of slight movements forward for Canada, there is much work to be done.

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<sup>33</sup> Ahmad, Points-Based Immigration Systems: Canada.

<sup>34</sup> Bauder 169.

<sup>35</sup> Tannock 19.

<sup>36</sup> Boucher 385.

<sup>37</sup> Boucher 393.

<sup>38</sup> Hawthorne, Leslyanne. "Foreign Credentials Recognition and Assessment: An Introduction." *Canadian Issues* (2007): 3-13. *Google Scholar*. Web. 05 March. 2016.

<http://search.proquest.com/openview/5c5d762c5446e4f56a2bb61376775610/1?pq-origsite=gscholar>, 8.

<sup>39</sup> Anwar, Arif. "Canadian Immigration Policy: Micro and Macro Issues with the Points Based Assessment System." *Canadian Ethnic Studies* 46.1 (2014): 169-79. *Google Scholar*. Web. 05 March. 2016.

[http://muse.jhu.edu/login?auth=0&type=summary&url=/journals/canadian\\_ethnic\\_studies/v046/46.1.anwar.html](http://muse.jhu.edu/login?auth=0&type=summary&url=/journals/canadian_ethnic_studies/v046/46.1.anwar.html), Canadian Immigration Policy, 175.

<sup>40</sup> Hawthorne 10.

Some will see any immigration system with a discretionary basis for exclusion and admission as unfair or exclusionary. What is needed is a more liberal way to regulate immigration that does not disadvantage any particular group of people, especially regarding conditions they cannot control, such as their birthplace and attendant access to education. It is impractical to abolish the points-system to achieve aims of justice, as it is regarded across the globe as one of the most neutral and fair systems, and no better solutions are forthcoming. Thus, actions must come from within Canada to improve its current system. In order to eliminate the discrimination that this paper has identified, there need to be further improvements with the differential evaluation of what is deemed to be skill and what are valued in terms of education credentials. Perhaps it may be beneficial to re-implement a version of the Live-In Caregiver Program that Canada previously maintained, which would help bridge the gap between the high-skilled, male-dominated education that we formally recognize, and the equally important domestic skills of many women from the less-developed world. Additionally, the inclusion of Gender Impact Assessments may be particularly beneficial, as they are “based on the systematic evaluation of the roles, power relations, wealth and choices of men and women” to examine how immigration policies affect men and women differently.<sup>41</sup> Moreover, when education becomes a means for the privileged to get ahead, and when a discrepancy grows between the liberal principles of Canada and its actions, change is essential. It is critical for Canada to realize these inherent problems with educational assessment, and to take action, if Canada is to remain truly committed to being a fundamentally liberal state.

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<sup>41</sup> Kofman, Eleanor. "Towards a Gendered Evaluation of (Highly) Skilled Immigration Policies in Europe." *International Migration* 52.3 (2014): 116-28. *Google Scholar*. Web. 26 Feb. 2016. <http://onlinelibrary.wiley.com/doi/10.1111/imig.12121/abstract?systemMessage=Wiley+Online+Library+will+be+unavailable+on+Saturday+27th+February+from+09%3A00-14%3A00+GMT+%2F+04%3A00-09%3A00+EST+%2F+17%>.

## Canadian Refugee Policy: Evaluating Healthcare Delivery

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Anah Mirza

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### I Introduction

According to the 1951 United Nations **Convention** relating to the Status of **Refugees (the Refugee Convention)**, the term refugee is applicable to someone unable or unwilling to return to his or her country of origin owing to a well-founded fear of persecution.<sup>1</sup> In this paper, refugees and asylum-seekers will be referred collectively to as refugees, with a distinction being drawn at times when the services their specific statuses afford diverge. The term non-citizens will be applied to encompass refugees as well as immigrants who do not have the designation of permanent resident. Refugees face health care challenges similar to individuals entering a country through the mainstream immigration process, but often with additional factors unique to the circumstances of their migrations.<sup>2</sup>

In January 2015, Stephen Harper's Conservative government committed to resettling 10,000 Syrian refugees by the year 2018. During the federal election campaign later that year, the Liberal Party embedded a promise to resettle 25,000 refugees by the end of the calendar year into its platform.<sup>3</sup> After winning a majority in mid-October, the new Liberal government met its benchmark almost two months into the New Year. It then promised to resettle another 25,000 Syrian refugees by the end of 2016.<sup>4</sup>

This resettlement plan is a response to the Syrian civil war that began in 2011, and which has since displaced at least 11.2 million people, 6.6 million of whom remain internally displaced in the country.<sup>5</sup> The forced migration issue is further exacerbated by the threat of Daesh, an extremist group aiming to construct a caliphate. Daesh is moving towards this goal by obtaining control of territory,

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<sup>1</sup> "Convention and Protocol Relating to the Status of Refugees," United Nations, April 1, 2011, accessed January 22, 2016, <http://www.unhcr.org/3b66c2aa10.html>. Page 14.

<sup>2</sup> Canadian Task Force on Mental Health Issues Affecting Immigrants and Refugees, *After the Door Has Been Opened: Mental Health Issues Affecting Immigrants and Refugees in Canada: Report of the Canadian Task Force on Mental Health Issues Affecting Immigrants and Refugees*, Ottawa: Multiculturalism and Citizenship Canada, 1988.

<sup>3</sup> Stephanie Levitz, "Canada's Ever-changing Response to Syrian Refugee Crisis," *Toronto Star*, January 1, 2016, accessed March 27, 2016, <http://www.thestar.com/news/canada/2016/01/01/canadas-ever-changing-response-to-syrian-refugee-crisis.html>.

<sup>4</sup> Terry Pedwell, "Canada To Get up to 50,000 Refugees by End of 2016," *Toronto Star*, December 2, 2015, accessed March 12, 2016, <http://www.thestar.com/news/canada/2015/12/02/canada-to-get-up-to-50000-refugees-by-end-of-2016.html>.

<sup>5</sup> "Syria Regional Refugee Response," United Nations High Commissioner for Refugees, accessed March 26, 2016, <http://data.unhcr.org/syrianrefugees/regional.php>.

mostly in Iraq and Syria.<sup>6</sup> As the Syrian refugee crisis nears “protracted status”—i.e., a crisis lasting more than five years—temporary solutions such as refugee camps and limited asylum in countries close to Syria, are becoming less feasible. To deal with the massive movement of people fleeing conflict, long-term solutions are required, including comprehensive resettlement.

Resettlement does not involve the mere acceptance of an asylum claim or the facilitation of movement across another country’s borders; rather, it involves the integration processes that follow the initial movement. As such, this study focuses on one component of comprehensive resettlement, that of healthcare, especially as it pertains to psychiatric and non-physical conditions refugees may experience as a result of the severe circumstances of their migration.

Ontario—Canada’s largest province—is the resettlement site for a large proportion of the Syrian refugees, with the provincial government having announced in September 2015 the funding to support the resettlement of at least 10,000 refugees by the end of 2016.<sup>7</sup> At the same time, Ontario’s healthcare system is experiencing strain. For example, the province continues to have one of the lowest doctor-to-population ratios in the country.<sup>8</sup> There are barriers to healthcare access among refugees and asylum-seekers in Ontario—in fact, these are exacerbated by existing strains on the delivery of mental health treatment in the province—resulting in failures to address specific needs presented by these groups. With respect to refugee health care needs, is resettlement in Ontario under these conditions suitable? What ethical framework underpins this? How may we assess varying levels of refugee health care allocation given putatively universal liberal democratic norms?

## II Discussion

First and foremost, refugee healthcare access may be a legal issue with jurisdictional and other concerns. Although healthcare is under provincial jurisdiction, the federal government makes changes to refugees’ level of access by adjusting immigration policy, which falls within federal jurisdiction. The 2012 Conservative government changes reduced access for both refugees and citizens.<sup>9</sup> With respect to more

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<sup>6</sup> Graeme Wood, "What ISIS Really Wants," *The Atlantic*, March 2015, accessed March 22, 2016, <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>.

<sup>7</sup> Ministry of Health and Long-Term Care, *Ontario Health System Action Plan: Syrian Refugees*, Toronto: Ontario, 2015, 3.

<sup>8</sup> Ontario Medical Association, "CIHI Report Doesn't Show Full Strain Placed on Ontario Health System," *Ontario Medical Association*, September 29, 2015, accessed March 12, 2016, <https://www.oma.org/Mediaroom/PressReleases/Pages/CIHIReport.aspx>.

<sup>9</sup> Helen P. Harris and Daniyal Zuberi, "Harming Refugee and Canadian Health: The Negative Consequences of Recent Reforms to Canada’s Interim Federal Health Program," *Journal of International Migration & Integration* 16.4 (2014): 1049, accessed January 25, 2016, doi:10.1007/s12134-014-0385-x.

comprehensive refugee policy, some scholars argue that Canadian refugee policy is already exceptional enough, meaning that in relation to other Western countries, Canada's treatment of refugees is progressive.<sup>10</sup> Authors critical of less restrictionist policy are skeptical of lenient refugee law because of concerns for public infrastructure, specifically the possibility of too much added strain on mental health and social services. A commonly cited reason for the province's infrastructure strain is Ontario's aging population.<sup>11</sup>

One also often sees the values of humanitarianism and of citizenry put into competition in liberal democratic governments seeking to exercise pragmatic politics.<sup>12</sup> Conceived as a zero-sum game and framed by questions about the limits of responsibility, increased shares of healthcare services going to non-citizens—especially refugees—are understood to require decreased shares going to citizens. There are, however, alternative ethical framings that reconcile refugee and national interests.<sup>13</sup> By collectivizing benefit, even if it exists at different levels, losses are no longer framed as absolute losses directly countered by wins on the other side.

On the practical side, Ontario's Health System Action Plan for the Syrian refugees stipulates that health screening is to be cleared as generally good prior to arrival in Canada, while acknowledging the particular health needs following the experience of war and camp conditions.<sup>14</sup> The 1988 report "After the Door has been Opened," recognized that refugees' settlement and adaptation processes have significant mental health aspects, aside from explicit trauma. Separation from family, loss of social support, language barriers, cultural adjustments, and other aspects of settlement in Canada render refugees vulnerable to mental health challenges. The report recommended key increases in: the universal accessibility of remedial services to migrants; the cultural sensitivity of all Canadians involved in the resettlement process, from teachers to immigration officers; and the sharing of non-citizen mental health as a prioritized concern by all levels of government.<sup>15</sup> Additionally, worth considering is the fact that

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<sup>10</sup> Eric Omeziri and Christopher Gore, "Temporary Measures: Canadian Refugee Policy and Environmental Migration," *Refuge* 29.2 (2014): 51, accessed January 24, 2016, <http://refuge.journals.yorku.ca/index.php/refuge/article/view/38166/34562>.

<sup>11</sup> Ontario Medical Association, "CIHI Report Doesn't Show Full Strain Placed on Ontario Health System," News release, September 29, 2015, accessed March 12, 2016, <https://www.oma.org/Mediaroom/PressReleases/Pages/CIHIRReport.aspx>.

<sup>12</sup> Matthew J. Gibney, "Asylum: Principled Hypocrisy," in *Migration: The COMPAS Anthology*, ed. by B. Anderson and M. Keith, (Oxford: Centre on Migration, Policy and Society, 2014), 3.

<sup>13</sup> Christina Boswell, *The Ethics of Refugee Policy* (Aldershot: Ashgate, 2005), 150.

<sup>14</sup> Ministry of Health and Long-Term Care, *Ontario Health System Action Plan: Syrian Refugees*, Toronto: Ontario, 2015, 9.

<sup>15</sup> Canadian Task Force on Mental Health Issues Affecting Immigrants and Refugees. *After the Door Has Been Opened*, 1988, 3.

treatment also involves a variety of resources, as opposed to the traditional arsenal of psychotherapy and counseling that will nonetheless comprise a large majority of services made available. Studies in the United Kingdom have shown that non-citizen participants use the services of primary care physicians, psychiatrists, and complementary and alternative health practitioners such as naturopathic doctors, acupuncturists, and massage therapists, to address their mental health care needs.<sup>16</sup> Yet, while numerous reports indicate increased rates of post-traumatic stress disorder and depression in refugees to Canada, only a minority of refugees will develop diagnosed mental health problems.<sup>17</sup>

If care-reducing policy is enacted and medical practitioners are not prepared ahead of time, they will experience a moral dilemma posed by the competition between restrictionist government policy and their pledge to deliver care as needed when faced with patients lacking coverage. A 2009 UK study found that this increased probability was demonstrated except in circumstances where practitioners had already arranged other means of addressing the mental health needs of refugee patients.<sup>18</sup> As Ontario operates under the aegis of Canada's universal healthcare scheme, it is likely that medical professionals will experience difficulty in countering government policy when it comes to cases of underserved patients. There is also concern from practitioners that the current lack of full health coverage for privately-sponsored refugees under the Interim Federal Health Program will make it difficult to meet Syrian refugees' health needs<sup>19</sup> immediately upon entering Canada.<sup>20</sup>

Importantly for the long view on health policy and divvying scarce resources, prompt access to appropriate mental health care decreases the need for more costly interventions later on, such as hospitalization.<sup>21</sup> It is thus the most cost-effective choice. The Commission's January 2016 report also notes that over-treating and over-pathologizing refugee populations can be counterproductive to refugees' mental health needs. The Commission suggests switching the focus to promoting resilience and increasing the individual, family, and community's ability to self-manage. Here, there is a clear parallel to the attitude of mental health organizations towards citizens suffering from mental illness. Evidently, the

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<sup>16</sup> Chen, Y.Y. et al. "Improving Access to Mental Health Services for Racialized Immigrants, Refugees, and Non-Status People Living with HIV/AIDS," *Journal of Health Care for the Poor and Underserved* 26.2 (2015): 508, accessed March 7, 2016, doi:10.1353/hpu.2015.0049.

<sup>17</sup> Mental Health Commission of Canada. *Supporting the Mental Health of Refugees to Canada*, 2016, 7.

<sup>18</sup> Keith Taylor. "Asylum Seekers, Refugees, and the Politics of Access to Health Care: A UK Perspective," *The British Journal of General Practice* 59.567 (2009): 770, accessed February 18, 2016, doi:10.3399/bjgp09x472539.

<sup>19</sup> Michael Colborne. "Syrian Refugees' Mental Health Is Top Priority," *Canadian Medical Association Journal* 187.18 (2015): 1347, accessed March 5, 2016, doi:10.1503/cmaj.109-5183.

<sup>20</sup> Biljana Vasilevska and Laura Simich. "A Review of the International Literature on Refugee Mental Health Practices," *Canadian Issues* (2010): 36, accessed January 22, 2016, [http://www.metropolis.net/pdfs/immi\\_health/Immigrant Mental Health - pgs33-38.pdf](http://www.metropolis.net/pdfs/immi_health/Immigrant_Mental_Health_-_pgs33-38.pdf).

<sup>21</sup> Mental Health Commission of Canada. *Supporting the Mental Health of Refugees to Canada*, 2016, 8.

expectation of care is equal and not more, consistent with the stipulation of healthcare allocations for refugees as being equal to that of the host population, in the Refugee Convention.<sup>22</sup> While non-binding, international law bequeaths a universal right to physical and mental health.<sup>23</sup> The province's *Health System Action Plan* specifically highlights that the development of a specialized strategy is due to the scale of the effort, both intake-wise but also timeline-wise. The province is careful to articulate that it is not in favour of special treatment to any refugee or citizen. Additionally, Refugee Convention signatories have consented to refugee commitments, and it can reasonably be expected that liberal democratic states have projected the social welfare costs of intake.

Theoretically, non-citizens in Canada enjoy robust protection of human rights.<sup>24</sup> Canada extends constitutional rights to all residents of the country, regardless of citizenship status, interpreting it in light of international human rights commitments.<sup>25</sup> The Federal Court rules the aforementioned Conservative government efforts to curb refugee access to health care were "cruel" and unjust; the Conservatives did not contest the ruling and the incoming Liberal government reversed the offending cuts.<sup>26</sup>

Having explored international norms and law, it is prudent to consider procedural barriers to healthcare access. According to a 2011 US study, front-line barriers to health care access include mental illness, fatalism and perceived discrimination.<sup>27</sup> The study concluded that refugees and asylum-seekers have poor access to healthcare because qualitative data portraying their experience is lacking, despite researchers having used a number of means of evaluation.<sup>28</sup> Studies of this kind are enacted in subscription to the notion that patient feedback can inform better healthcare practices, and researchers are known to express data scarcity on two levels: first, when the subjects are limited to non-citizen patients, and, second, when the focus is mental health treatments.

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<sup>22</sup> "Public Health," United Nations Refugee Agency, accessed March 29, 2016, <http://www.unhcr.org/pages/49c3646cdd.html>.

<sup>23</sup> "Public Health."

<sup>24</sup> Catherine Dauvergne. "International Human Rights in Canadian Immigration Law—The Case of the Immigration and Refugee Board of Canada," *Indiana Journal of Global Legal Studies* 19.1 (2012): 305, accessed February 14, 2016, doi:10.2979/indjglolegstu.19.1.

<sup>25</sup> Dauvergne. "International Human Rights in Canadian Immigration Law—The Case of the Immigration and Refugee Board of Canada," 306.

<sup>26</sup> "Liberal Government Fully Restores Refugee Health Care Program," *CBC News*, February 18, 2016, accessed April 10, 2016, <http://www.cbc.ca/news/politics/mcallum-philpott-interim-federal-health-program-refugees-1.3453397>.

<sup>27</sup> Ramin Asgary and Nora Segar. "Barriers to Health Care Access Among Refugee Asylum Seekers," *Journal of Health Care for the Poor and Underserved* 22.2 (2011): 516-518, accessed February 18, 2016, doi:10.1353/hpu.2011.0047.

<sup>28</sup> Asgary and Segar. "Barriers to Health Care Access Among Refugee Asylum Seekers," 519.

### III Conclusion

Ultimately, a more just approach to refugees and asylum-seekers resettling in Canada requires the federal government to take responsibility for earlier health interventions and to provide more robust, comprehensive, and less stressful access to health services. Historically, the Canadian government responds to crises of refugee resettlement in a reactive manner,<sup>29</sup> but psychiatric and mental healthcare needs are too diverse to be arranged for in real time. This means that proactive measures are necessary. Beyond the Refugee Convention, Canada is also one of a smaller group of signatories who offer not just temporary protection, but the option of permanent resettlement with its associated costs.<sup>30</sup> As such, it can be expected that the federal and provincial governments have, at the very least, considered the pragmatism of the large-scale resettlement. With respect to the state's responsibility unto its non-citizen residents, it is useful to employ a rights-based approach. Healthcare should be considered essential and deserved by all residents, regardless of immigration status.

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<sup>29</sup> Omeziri and Gore. "Temporary Measures: Canadian Refugee Policy and Environmental Migration," 51.

<sup>30</sup> Morton Beiser. "The Health of Immigrants and Refugees in Canada." *Revue Canadienne De Sante Publique* 96.2 (2005): 31, accessed March 28, 2016, [journal.cpha.ca/index.php/cjph/article/download/1494/1683](http://journal.cpha.ca/index.php/cjph/article/download/1494/1683).

## SECTION II: HEALTH, MEDICINE & SCIENCE

### Ethical Implications of CRISPR-Cas9 Genome Editing

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Janna Maier

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In early February of 2016, controversy was sparked when the *Human Fertilisation and Embryology Authority (HFEA)* in Britain approved the use of CRISPR-Cas9 in human embryo gene modification experiments.<sup>1</sup> Only developed in the past four years and pioneered in the United States by Jennifer Doudna at the University of California Berkeley, CRISPR-Cas9 uses the innate immune ability of bacteria to create targeted deletions and insertions in DNA sequences.<sup>2</sup> Traditionally, inducing modifications in DNA has been limited to certain model organisms such as mice and zebrafish, and has required the addition of identifiable markers which are then left behind in the genome.<sup>3</sup> As a result, typical nucleases and oligonucleotides have not been considered as a viable experimental tool for the human genome. The introduction of CRISPR-Cas9, however, has completely changed the field of biotechnology and microbiology, making editing the human genome a cheap and easy reality.<sup>4</sup> CRISPR, which is an abbreviation for Clustered Regularly Interspaced Short Palindromic Repeats, is an adaptive immune sequence in the DNA of bacteria, in between which invading DNA can be incorporated into the host genome.<sup>5</sup> This CRISPR sequence in the DNA is then transcribed to synthesize CRISPR RNAs which then can associate with a protein called Cas to silence any foreign DNA that matches the synthesized CRISPR RNA;<sup>6</sup> thus protecting the bacteria from any foreign material and viruses.

A diverse set of CRISPR-Cas systems exists and has been elucidated to date. The type II CRISPR-Cas system is the most widely used form and utilizes Cas-9 to create double-stranded breaks in the invading

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<sup>1</sup> E. Callaway, "UK scientists gain licence to edit genes in human embryos" *Nature*, 1 February 2016, <http://www.nature.com/news/uk-scientists-gain-licence-to-edit-genes-in-human-embryos-1.19270>

<sup>2</sup> J. Achenbach, "Scientists debate the ethics of an unnerving gene-editing technique," *The Washington Post*, 1 December 2015, <https://www.washingtonpost.com/news/speaking-of-science/wp/2015/12/01/historic-summit-on-gene-editing-and-designer-babies-convenes-in-washington/>; JD Sander and JK Joung, "CRISPR-Cas systems for genome editing, regulation and targeting," (2014) 32(4) *Nat Biotechnol* 347-355.

<sup>3</sup> Ibid.

<sup>4</sup> Achenbach.

<sup>5</sup> B Wiedenheft, SH Sternberg, and JA Doudna, "RNA-guided genetic silencing systems in bacteria and archaea," (2012) 482 *Nature* 331-338.

<sup>6</sup> JA Doudna and J Anderson, "CRISPR systems in prokaryotic immunity" *The Doudna Lab*, 2012 <http://rna.berkeley.edu/crispr.html>.

DNA.<sup>7</sup> Cas9 can be specifically programmed for cleavage at particular DNA sites; therefore it has become quite a flexible platform for genome modification.<sup>8</sup> While Jennifer Doudna wanted to leave the probing questions to the bioethicists and simply “get on with the science”,<sup>9</sup> she underestimated the argument surrounding her discovery. In fact, biologists in China had already reported conducting CRISPR experiments on the human germline earlier in 2015,<sup>10</sup> but well-regarded journals *Nature* and *Science* refused to publish their results due to the Chinese group’s apparent disregard of ethical implications.<sup>11</sup> The ethical consequences of CRISPR have been handled very cautiously up until now, with a conference even being held in March of 2015 in Napa, California to discuss the ethical issues. While the new technology could certainly promise the elimination of heritable disorders and diseases by a simple deletion of a deleterious DNA sequence (Achenbach, 2015), it has also been heavily criticized due to its potential negative impact on future generations.<sup>12</sup> More than this, the use of CRISPR-Cas9 walks a fine line between treatment and enhancement of the human race, creating a very slippery slope and a clear ethical dilemma. Often, the use of ethical theories can help investigate an ethical dilemma and guide us to a solution. This paper will use three ethical theories to analyse this new gene editing technology: Utilitarianism to determine the good of the consequences, Deontology to determine the good of the action, and Principlism to weigh the action against four main moral healthcare principles. Finally, the issue will be discussed incorporating elements of each of the three theories

Utilitarianism, as developed by John Stuart Mill in the nineteenth century, specifically focuses on the consequences of an action. Right actions are those which bring about the greatest amount of good consequences for the greatest number of people.<sup>13</sup> For Mill, the greatest good meant the greatest amount of happiness. This is known as his “Greatest Happiness Principle”, in which every person’s happiness is equivalent.<sup>14</sup> Typically, a cost-benefit analysis is the simplest way for a utilitarian to judge which action will bring about the most good, however this becomes quite challenging with emerging technologies where knowledge is limited. For example, negative consequences of using the CRISPR-Cas9 tool for genome modification have not yet been discovered or reported because the technology has only been developed very recently. Without the knowledge of any costs, it becomes difficult to generate an accurate

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<sup>7</sup> Ibid.

<sup>8</sup> Wiedenheft et al; Sander and Joung.

<sup>9</sup> Doudna, 2015.

<sup>10</sup> D Cyranoski & S Reardon, “Chinese scientists genetically modify human embryos,” *Nature*, 22 April 2015 <http://www.nature.com/news/chinese-scientists-genetically-modify-human-embryos-1.17378>.

<sup>11</sup> L Jiang and H Stevens, “Chinese biotech versus international ethics? Accounting for the China-America CRISPR ethical divide,” (2015) 10 *BioSocieties* 438-488.

<sup>12</sup> E Lanphier et al. “Don’t edit the human germ line,” *Nature*, 12 March 2015, <http://www.nature.com/news/don-t-edit-the-human-germ-line-1.17111>

<sup>13</sup> P. Singer, *Practical Ethics: Second Edition* (Cambridge: Cambridge University Press, 1993).

<sup>14</sup> Ibid.

cost-benefit analysis. Utilitarianism is traditionally used in medicine, but it seems that it is less appropriate for the judgment of an emerging technology such as CRISPR-Cas9. On the other hand, because the benefit of CRISPR-Cas9 is the main driving force for its use in human embryos, and because we do not want to lose sight of that benefit, we are led to highlight the weakness of utilitarianism in this regard.

The clear benefit of using CRISPR-Cas9 to edit the human genome would be the eradication of certain heritable diseases or conditions for not only this generation, but all future generations of humans as well. On an individual scale, usually affected children would have a higher quality of life, no longer having to live with a debilitating disease and no longer having to worry about passing it on to their own children. On a sociological scale, this would mean less taxpayer dollars spent on healthcare and research on these diseases, and more focus put on other non-heritable diseases and conditions. The overwhelming benefit is that since CRISPR-Cas9 physically edits the genome, once the deleterious DNA sequence is deleted from the genome of one person, it can no longer be passed onto their offspring.<sup>15</sup> Eventually, more and more generations of people will be able to live genetic disease-free lives. This technology could benefit the human race as a whole; therefore technically this would be defined as generating the most good for the largest number of people. If “good” were defined as a life without a certain disease, then this action of using CRISPR-Cas9 would clearly bring about the most good. However, how do we define which diseases fall under this umbrella? More importantly, this also implies that all people currently living with such diseases are living lives containing significant elements opposed to the “good.” In the case of a debilitating disease such as Multiple Sclerosis or Huntington’s, it is quite clear that a wheelchair bound life with no motor neuron control, a loss of the ability to talk or to be self-sufficient is not something people wish for. While Down’s syndrome, deafness or blindness may not be wished for either, people with these conditions are able to become successful members of society with some even not wishing they were born any different. Therefore, “good” may not mean disease-free for everyone in the world.

Using utilitarianism to examine the CRISPR-Cas9 system involves some vagueness. Mill’s definition of “good” as the greatest amount of happiness is hard to put to use in a practical sense, as happiness may be defined differently by different people. For Mill’s greatest happiness principle to work easily, it must be assumed that every person defines happiness as the exact same thing. Additionally, defining “good” as a life without a particular disease or as a life without any disease at all are two vastly different statements. Eradicating a certain genetic disease from the human race may bring about a large amount of good, however by this logic, eradicating *all* diseases from the human race would bring about the most good.

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<sup>15</sup> Achenbach.

Using the utilitarian logic of doing the most “good” could eventually lead to a blurring of the line between treatment and enhancement. An issue also lies in the definition of “disease”. For example, if it was discovered that certain markers for depression existed in the human genome, should this sequence be deleted as well? The use of language such as “good” and “bad” to define significant aspects of human lives and as a reason to eradicate diseases could potentially encourage medically unnecessary genetic modifications and potentially even lead to eugenics.

Let me return to the fundamental issue of currently unpredictable results regarding utilitarianism and CRISPR-Cas9 technology. Since CRISPR-Cas9 has only been developed recently and has only received approval in the United Kingdom for use in human embryos even more recently, there is little concrete knowledge of either the negative or the positive effects of this technology on humans. Creating an accurate cost-benefit analysis requires a certain amount of knowledge of both the costs and the benefits. At this point in time, the potential benefit of eradicating genetic diseases is precisely that: potential. In addition, there is currently no information about the potential costs of this technology on one generation of children, let alone on future generations.<sup>16</sup> Acquiring such information will require years of research. While we wait, however, we cannot simply assume that artificially editing the human genome will have absolutely no cost. Without sufficient information, an accurate cost-benefit analysis cannot be completed; it is a guess at best. As a result, while a large potential benefit is highlighted, utilitarianism does not lead to a clear decision about the use of CRISPR-Cas9 due to the limited knowledge of the negative effects of this technology.

Deontology differs from utilitarianism as it disregards consequences completely; instead, the focus is on whether or not the action itself is fundamentally right or wrong. Stemming from the Greek word *deon* meaning duty, deontology places heavy emphasis on the absolute nature of following moral duty and universal maxims, as advocated most notably by Immanuel Kant.<sup>17</sup> The leading deontologist, Kant believed that one should only act in a way that one is comfortable with being a universal law, and that this criterion should dictate if the action is right or wrong.<sup>18</sup> It is this universality that attracts many healthcare professionals to deontology. Traditional duties and oaths stem from this kind of view.<sup>19</sup>

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<sup>16</sup> Lanphier et al.

<sup>17</sup> Singer.

<sup>18</sup> D. Misselbrook, “Duty, Kant, and Deontology” (2013) 63 (609) *British Journal of General Practice* 211.

<sup>19</sup> *Ibid.*

One of Kant's overruling moral duties is to never use a person as a means to an end.<sup>20</sup> If a human embryo is a person, the use of CRISPR-Cas9 would clearly violate this duty as it quite literally uses a human embryo as a means to eradicate a certain disease. Kant also strongly believed that one has a duty to respect another's autonomy and not to coerce or deceive others.<sup>21</sup> Under this duty, a deontologist would also be against CRISPR-Cas9 genome editing as the human embryo (and future child) being affected has no say in the decision; technically the child would have been coerced into this situation as they have no ability to object. The issue with autonomy will be further discussed at a later stage in this paper under the Principlist view. Since deontology has universal duties which cannot be violated under any circumstances, a deontologist would quite clearly always object to CRISPR-Cas9 genome editing.

The universality of deontology, however, can cause issues in circumstances of moral conflicts. In this case for example, while the majority of traditional deontologists would object to genome editing in humans, as mentioned above, this could come into conflict with a parent's duty to their child. Using CRISPR-Cas9 to delete a particular sequence in the DNA which causes a disease could potentially also be seen as a parent's duty to help and protect their child. Therefore a conflict arises between these two duties to help their child and the duty not to deceive them and to not use them as a means to an end. A traditional deontologist, however, would hold Kant's duty to not use another human as a means to an end in a very high regard and thus never violate it.

The ethical theory of Principlism, developed by Beauchamp and Childress, encompasses four separate tenets, all of which are deeply rooted in medical tradition: beneficence, non-maleficence, autonomy and justice.<sup>22</sup> Beneficence and non-maleficence are quite similar to one another, with the former referring to the duty to help others, and the latter is the duty to prevent harm from coming to others. The principle of autonomy states that a person has the right to their own body and the right to make whatever decisions he/she wishes to in regards to it. Justice ensures that everyone has access to the same resources and that these resources are distributed fairly. These four principles are commonly used interchangeably in healthcare and are regarded as prima facie binding but not absolute, which differentiates them from deontology.<sup>23</sup> In fact, in the event that one duty comes into conflict with another, Beauchamp and

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<sup>20</sup> Ibid.

<sup>21</sup> Singer.

<sup>22</sup> P. Mallia, *The Nature of Doctor-Patient Relationship: Health Care Principles through the Phenomenology of Relationships with Patients*, (Dordrecht: Springer, 2013): 7-25.

<sup>23</sup> Ibid.

Childress encourage the weighing of these prima facie duties against one another to determine which one overrules.<sup>24</sup>

In terms of genome editing using CRISPR Cas-9, beneficence is the main driving force for it, as the main goal of using this technology is to help the child at hand as well as future generations. In the same way, the use of CRISPR-Cas9 is in line with the principle of non-maleficence as deleting certain deleterious DNA sequences would prevent the child, and any future children, from the harm of living with a genetic disease.

The principles of autonomy and justice, however, would typically be in opposition to CRISPR-Cas9 genome editing. A large objection, as mentioned above with respect to Deontology, is that the autonomy of the child in question is being disrespected as they have no say in the decision to alter their genome, even though they are the supposed beneficiaries of this technology. More than this though, the autonomies of all future offspring born from this child in question will also be violated as any modification in the genome will be directly inherited by the next generation.<sup>25</sup> In Canada, the principle of autonomy is importantly the overriding prima facie duty in Principlism and in practical healthcare.<sup>26</sup> Therefore, a violation of this would be a clear violation of the Canada health act. A consent process would have to be developed to address some of these issues. However, gaining the consent of future generations which have not been born yet is impossible. As a result, this principle of autonomy may always be a clear boundary against this technology, especially in a country such as Canada.

An even larger objection to the emerging CRISPR-Cas9 technology is the potential violation of the principle of justice. If and when this technology becomes available to the general public, it must be considered to whom it will become available. According to the principle of justice, every single person in the world should have access to CRISPR-Cas9 to be able to delete harmful, disease-causing sequences in their child's DNA. This would mean that every single person in both first and third world countries should have access to this technology in the same safe and professional environment. This would ensure that targeted diseases are indeed eradicated from the human race as a whole, and not just eradicated from the gene pools of those who can afford, and have access to, the technology. After all, the main driving force and promise of this technology is directed at the *whole* human race.

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<sup>24</sup> Ibid.

<sup>25</sup> J. Smolenski, "CRISPR/Cas9 and Germline Modification: New Difficulties in Obtaining Informed Consent," (2015) 15 (12) *American Journal of Bioethics* 35-68.

<sup>26</sup> D Unger, *The Canadian Bioethics Companion*, 2016. <http://canadianbioethicscompanion.ca/the-canadian-bioethics-companion/chapter-2-the-doctor-patient-relationship/#RESPECT-FOR-AUTONOMY>.

If this principle of justice is not adhered to, and the access of the technology is limited, groups of ‘haves’ and ‘have-nots’ could evolve; namely a group of those without any genetic disease thanks to CRISPR-Cas9 and a group of those who are not genetically modified and are thus still affected by genetic diseases. This group of ‘have-nots’ would then clearly be at a disadvantage, both on an individual and sociological level. Individually, they will not be as healthy, therefore having limited access to work and education, and eventually having a lower socioeconomic status in comparison to those that are disease-free.

Sociologically, this would eventually lead to the eradication of the group of ‘have-nots’, as they are not as evolved as those with access to the technology. Very quickly, the use of this technology could turn into eugenics. Clearly the practicality of this technology needs to be addressed first and foremost, in order to avoid perpetuation and creation of segregations between groups of people.

Clearly, the genome editing technology is a fantastic opportunity for the human race, but it also has many caveats when considered in a practical sense. Therefore its use should be limited. While the issues in defining “good” and which diseases to be considered are significant, it would be a shame to simply dismiss any emerging technology due to the potential sociological difficulties associated with it. I agree with the benefit outlined by the utilitarian view; however CRISPR-Cas9 should only be available for those with debilitating genetic diseases where there is a clear known cost to living with the disease. As a result, there would be a universal push to eradicate such diseases. This would not be controversial. While defining a “debilitating disease” is no easy task, it does narrow the window of diseases. Things would become much more complicated if CRISPR-Cas9 genome editing was open to almost every single disease and condition, as the definition of a “good” life for one person may be living without said disease while the definition of a “good” life for another may not be influenced by their disease at all.

Another significant reason that this technology should be limited is due to the potential violation of the principle of justice under Principlism. Before making this technology available to the general public, it must be ensured that it is available to everyone in the world equally to avoid a further segregation of the ‘haves’ and ‘have-nots’. Third world countries, and those living in poverty in first world countries as well, already have constant poverty and low unemployment issues which would only be perpetuated by the introduction of such a technology. Similar situations have occurred in the past thirty years with the eradication of infectious diseases. For example, tuberculosis was heavily targeted in first world nations and thus eventually eradicated through the development and proper use of appropriate antibiotics and preventative measures. However, in third world countries such as Haiti where poverty is rife, tuberculosis continues to ravage its way through the country to this day, largely unbeknownst to those living safely

inside Canada's borders. Another example is the peak of HIV/AIDS in the 1980s in the United States which caused a panic due to its numerous deaths. Today, though, sufferers in first world countries have the ability to take medication every day to keep the disease under control and live a long life. In third world countries, however, the story remains much the same as it was in the 1980s in the USA, with high death rates due to the lack of access to the same medication had by sufferers in the United States. First world countries have a habit of forgetting about those living in poverty both inside their borders and in third world countries, which is exactly what the principle of justice works against. The key issue in these two examples is the lack of access that those living in poverty have, whether it be to medicine or preventative measures. If CRISPR-Cas9 became available to the public, lack of access to it by the lower class would simply perpetuate the current socio-economic classes.

After examining the ethical dilemma behind this CRISPR-Cas9 technology from three ethical perspectives, it becomes clear that Principlism is the most relevant of the three theories. While utilitarianism and deontology do have a strong history in the medical field, they become unsuitable and inflexible when considering an emerging technology. Under principlism, it can be seen that the principle of autonomy may always present a barrier to genome editing in a country such as Canada. Interestingly though, the principle of justice is the main opposing principle, bringing to light a discussion of treatment versus enhancement of the human race. If the main benefit of this CRISPR-Cas9 technology is being advertised as a way for the human race to evolve, then it must be made available to *all* humans, no matter their socioeconomic status or country of residence. If not, it will eventually become a form of enhancement and eugenics rather than treatment, regardless of intent. The next challenge, then, is discovering how to make such a technology accessible to everyone in a practical sense.

# Complicity and the Collective in Light of Physician-Aid-in-Dying

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Amitpal Singh

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## I Introduction

Our most significant actions as moral agents almost never occur in isolation from the actions of others. We act as individuals, but also as participants in the various collective endeavors that play a central role in the pursuit of our projects. Predictably, this collective membership has both positive and unsavory consequences. Not only can we be concerned with the causal power of collective endeavors, for their heightened potential for producing harms, but there is an obvious internal concern as well: what happens when the collective endeavors we participate in no longer reflect our personal moral convictions? More pressingly, what implications are there for our individual moral accountability if the collective endeavors we participate in entail involvement in acts that we deem morally abhorrent or impermissible?

To explore these questions, I first root them in the debate surrounding Physician-aid-in-dying, and physicians who have expressed a conscientious objection with providing this to patients post the Supreme Court's 2015 decision in *Carter v. Canada*. I then turn to fleshing out Christopher Kutz' charge that our common-sense moral concepts of complicity, which rely heavily on the notion that we are only accountable for outcomes which we could make a difference towards, fail to condemn individuals for their role in collective harm. Using Kutz' framework, I apply it to the concerns of conscientious objectors, and identify its implications. Finally, I suggest that despite the fact that a healthcare regime would be providing physician-aid-in-dying, conscientious objectors would not be complicit by participating in it. I contend that because large-scale collectives like healthcare regimes have no overarching, monistic purpose, conscientious objectors are not rendered complicit for the actions of others with them.

## II A Turn to the Practical: Physician-aid-in-Dying and *Carter*

Before exploring the questions above, I want to root them in the context of a pressing issue in Canadian bioethics, which I have hinted at already. On February 6, 2015, the Supreme Court of Canada unanimously ruled in *Carter v. Canada* that the criminal prohibition on physician aid-in-dying (PAD) was unconstitutional, insofar as it prevented individuals that met the following specific criteria from accessing it. The court struck down the Criminal Code prohibition against PAD for competent, consenting adults

who have a “grievous and irremediable condition.”<sup>1</sup> The federal government initially requested an extension of the declaration of invalidity, on the basis that it was crafting a legislative response to the *Carter* decision. This legislation would incorporate physician aid-in-dying as a legally available service in the Canadian healthcare regime. However, this too produced a whole host of controversy. Among the most prominent issues was the fact that there remain a variety of views on whether physician-aid-in dying is morally permissible, including among physicians. For instance, some physicians argue that helping patients die is equivalent to killing them, and thus impermissible. Others argue that even procedural participation is not morally permissible for physicians, and object to any involvement in assisting the death of patients, including providing a referral to a willing provider. Underlying this is a tension in two competing moral principles: the right of patients to access a legally available service, and the negative liberty of physicians to be free from compulsion in performing acts they deem morally impermissible. The Supreme Court of Canada captured precisely this concern in the *Carter* decision. Nothing in this declaration would compel physicians to provide assistance in dying. The *Charter* rights of patients and physicians will need to be reconciled in any legislative and regulatory response to this judgement.<sup>2</sup> Physicians who are objecting to providing PAD for these reasons are manifesting a “conscientious objection” (CO) – they have personal moral convictions, religious or secular, that lead them to reject providing PAD. We might quickly dismiss this as not being an issue: why not simply allow physicians who are comfortable with providing a patient with aid-in-dying, to do so, and require conscientious objectors to refer them onto the former? We could simply require conscientious objectors to refer on to another willing physician. This means that they need not carry out the procedure or treatment themselves, but nonetheless must provide referral in order for patient access to not be compromised. However, this quick and easy solution seems unavailable. Some physicians object to providing referral on the grounds that it constitutes *participation* in what seems to them, to be a morally abhorrent act. They are concerned, in other words, with *complicity*.

For now, I want to set aside the question of what type of healthcare regime would properly accommodate conscientious objectors. I want to first explore the relevant sense of moral complicity with which conscientious objectors are concerned. It is not simply their own direct causal involvement that appears to motivate concerns about complicity. Rather, the source of concern is in the perception that a *regime is collectively producing (what they take to be) morally impermissible harms*, and moreover, that they are employed in it. There are more abstract philosophical concerns at play here, to which I alluded in Section

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<sup>1</sup> *Carter v. Canada (Attorney General)* 2015 SCC 5.

<sup>2</sup> *Carter v. Canada (Attorney General)*.

I, and which I examine further in the following section.

### III Complicity in the Collective: the “I-We” Problem

The moral and political traditions that have shaped our understanding of accountability largely locate responsibility for moral action within the individual. According to Christopher Kutz, our common sense morality holds much of the same individualistic sympathies. In doing so, it fails to capture responsibility in collective action. In many cases, individuals act collectively to cause a morally problematic outcome, though it seems that individually, their actions make no difference.<sup>3</sup> In his diagnosis of this problem, Kutz argues that the Individual Difference Principle (IDP) is the notion that animates most common-sense discussions of complicity. The IDP holds that “I am only responsible for a harm if something I did made a difference to its occurrence. If substantially the harm would have occurred regardless of what I have done, I cannot be accountable for it.”<sup>4</sup>

The problem then, is that this naive account of moral accountability is toothless to condemn individuals when they participate in collective endeavors that yield moral harms. This is because by entering a collective, agents’ wrongdoing can be obscured via the claim that their individual acts made no difference to the outcome. The use of the IDP is what allows for this improper exoneration in situations where the morally problematic outcome is causally over-determined (i.e., there are two or more distinct sufficient causes). To illustrate this, we can look to a prominent example: execution by firing squad. The death of a victim by firing squad is over-determined: counterfactually, the act of firing by any *one* shooter makes no difference to the outcome, because another shooter would have killed the victim anyway.<sup>5</sup> Thus, on the IDP’s heavily counterfactual, causal framework, each shooter could potentially absolve themselves of accountability by contending that his act did not influence the outcome; “he would have died anyway,” we can imagine them arguing. This defense can be transposed to all sorts of other contexts: a meat-eater arguing that she is not responsible for the harms of factory farming because her individual actions “make no difference” to how many chickens are killed,<sup>6</sup> or a polluter arguing that her individual contributions to climate change were negligible, and thus, that she is not complicit in environmental harms. Christopher Kutz and others suggest that accepting this justification – biting the bullet – is unacceptable. This key failure of translating our overly individualistic account to the collective is what Kutz calls the “I-We”

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<sup>3</sup> Julia Nefsky, “Fairness, Participation and the Real Problem of Collective Harm,” *Oxford Studies in Normative Ethics* Vol. 5 (forthcoming), pp. 245-246.

<sup>4</sup> Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (2000): 3.

<sup>5</sup> Kutz, 119-121.

<sup>6</sup> Julia Nefsky, “Consequentialism and the Problem of Collective Harm” *Philosophy & Public Affairs* Vol. 39 (2011): 366-368. Also see Shelly Kagan, “Do I Make a Difference?” *Philosophy & Public Affairs* Vol. 39 (2011): 122.

problem. We are unable to find agents responsible for their roles in morally reprehensible collective acts, and this is a failure of our heavily causal, individualistic sense of complicity.

#### **IV Kutz on Participatory Intention: Implications for Conscientious Objectors**

Kutz' own solution is to replace this IDP-inspired account of collective complicity with one that captures the relevant relational aspects of collective harm. He proposes that the sufficient condition of moral accountability for participating in collective action is that of "Participatory Intention." For Kutz, a Participatory Intention is "an intention to do my part of a collective act, where my part is defined as the task I ought to perform if we are to be successful in realizing a shared goal." On this basis, he argues that all statements about collective acts can be ascribed to the individuals participating, "Because all collective action is explicable in terms of the intentionality of individuals – their motives, beliefs, and plans." Kutz' point is that individual members have participatory intentions as part of the collective: each participant understands the shared goal, is committed to it, and recognizes the role others will play in bringing it about. It is a joint endeavor, because it is recognized as such by the participants, and they act accordingly to bring its end about; their participatory intentions overlap.

The central upshot of this claim is that there is no room for the overly causal account of the Individual Difference Principle. On these grounds then, individuals can be held accountable for what others do as part of the collective, even if they have no causal links to its outcome. This amounts to what Kutz calls the Complicity Principle.<sup>7</sup> He writes: "I am accountable for what others do when I intentionally participate in the wrong they do or the harm they cause. I am accountable for the harm we do together, independently of the actual difference I make." Kutz goes on to summarize this in the pithy phrase "no participation without implication."<sup>8</sup>

This seems to furnish us with the conceptual apparatus needed to make sense of the complicity concerns of conscientious objectors, especially those who have argued that they cannot participate in a regime providing aid-in-dying to patients, because it would render them complicit, *even if* they were not directly causally involved in bringing it about. If no degree of complicity is acceptable, then the only permissible involvement for a CO seems to be none at all. In other words, it seems that withdrawal from a healthcare regime implementing aid-in-dying is the only tenable option for COs. I suspect that many conscientious objectors would reject this conclusion, especially in the healthcare context. Though this is the type of conclusion that would suit, for example, conscientious objection to military service, there seems to be

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<sup>7</sup> Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (2000) 122.

<sup>8</sup> *Ibid* p. 123.

some insistence that this conclusion is unacceptable for healthcare professionals. Other than simply being a source of their livelihood as employment, healthcare professionals may conceive of their role in a healthcare regime as vocational or meaningful in a substantive sense that extends beyond mere work. At the minimum, we can say that they have reasons to want to continue to participate in a manner that a conscientious objector in military conscription does not.

## V A Conceptual Error: the Collective as Monistic

I want to argue that there is indeed a way out of this undesirable conclusion. In particular, I think that finding individuals complicit in collective endeavors in the manner contended by Kutz, and other suggestions in that vein, makes a key conceptual error. To see this, let's take a step back and examine the strategy that has been presented. Discussions of collective complicity tend to begin from a concern with our overly individualistic conception of moral accountability, and then attempt to ground responsibility for the collective act by identifying an individual's role in producing it. Influenced by a rich legal literature on complicity, conspiracy, collaboration, and collusion etc.,<sup>9</sup> the examples invoked in ethical discourse frequently include the robbing of a bank, plotting a murder, or a corporation attempting to sell a product made with labour in violation of human rights, or whose products will be used to perpetuate human rights abuses. Partly due to the import of these examples, discussions of complicity still seem to be individualistic in a paradoxical sense – *they assume that the collective entity has a single, monistic purpose*. The group of bank robbers has as their goal the theft of the bank. The corporation has as its goal the turning of profits. The murderers have as their shared goal the death of their victim. The notion that the collective has a singular purpose seems to be implicit in all them. A discussion of complicity rooted on the participatory intentions of those involved also seems particularly comfortable in the domain of these examples. However, I want to argue that where it breaks down is in its application to large-scale entities that are not straightforwardly monistic in their goals. The brief application of Kutz' framework to a healthcare regime in the manner above is, I think, an instance of this. Often, the connection between distinct individuals in a collective, such as a healthcare system, is not that they have the same ends and participate in different means for that end, but rather that the collective is simply the occasion for individuals' own, distinct, plural projects. Agents participate in collectives because the pooling of resources means that it provides a more efficacious means to their private, and often varied, goals. The entity itself is simply the *condition of possibility* for the pursuit of these varied goals.

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<sup>9</sup> See 'Complicity and its Conceptual Cousins' in *On Complicity and Compromise*, (Chiara Lepora, Robert E. Goodin 2013) for the precise ways in which the legal definitions of these related terms differ.

The position I have taken has two commitments in understanding the concept of a collective. The first is that collectives have no overall, individual-participant independent purpose. They are simply emergent entities brought about by a plurality of individuals. Accepting that they have a single goal is what is motivating the mistaken view that we are complicit for whatever occurs in a system in which we participate. The ‘collective’ is thought to have a single, overarching purpose, which all participants are contributing towards, regardless of whether they avow it. This overarching goal of the collective is then imputed to individuals to find them complicit for it, at least in instances where it is morally problematic.

Here, it is important to make a clarification. In denying that they are monistic, my contention is not that collective endeavors often have plural goals, but rather that ‘the collective’ has no goals at all. What is plural, are its *uses by agents who themselves are the source of plural projects*. The collective, in other words, is simply a tool that facilitates them. The second feature of the account I am offering is that it allows for “modularity” within a collective endeavor. By modularity, I mean that agents are *not responsible* for the distinct ends served by a collective endeavor (which is entirely a function of the way *individuals* choose to use it) simply by entering the joint endeavor and providing the occasion for it. The individuals who are complicit are those who will the same morally impermissible use of a collective endeavor in service of a shared end.

I submit that this second feature, which roots culpability for abhorrent action taken on behalf of a nominal collective entity in individuals, avoids a key conceptual error. What I have in mind can be framed as the converse of Kutz’ “I-We” problem,<sup>10</sup> what I will call the “You-I” problem. By giving some sort of overarching purpose to a collective, we ascribe to it a goal that some, such as COs, will find morally problematic. Thus, when the system is used for this morally problematic end *by certain individual’s autonomous actions* (for their own projects); it is then ascribed to causally uninvolved persons in order to find them complicit. As I have just said, this error only occurs if we regard the collective as having some sort of overarching goal rather than simply facilitating the plurality of goals for which individuals will use it.

The key upshot of this, which I have hinted at already, is that we are not complicit for the ways in which our contributions to an amoral marketplace are used or misused by others of their own volition. Here, I am appealing to the notion that there cannot be straightforward links of moral responsibility drawn between individuals simply because they supply the means to another person’s wrongdoing in collective participation. This is because the voluntary action of other individuals acting in full knowledge, and

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<sup>10</sup> See Section III above.

without coercion, breaks the chain of responsibility via autonomous action by another agent.<sup>11</sup> For example, if a pharmacist dispenses drugs to a sick patient with a prescription, who instead of using the drugs to treat his/her ailment, decides to use it to create a lethal cocktail for a victim, the pharmacist is not thereby responsible. It is true that ‘but for’ the provision of drugs by the pharmacist, the act would not have occurred, but the chain of complicity is broken by the fact that a voluntary decision was made on the part of the sick patient to act in that way. In the language of the conceptual framework we have assembled, this can be said as follows: the pharmacist acted in accordance with his role in dispensing drugs for which there is a valid prescription and medical diagnosis. Thus, his motivation for supplying the drugs is in accordance with his professional duties. The patient’s project of harming another individual is made possible by this, namely by receiving the prescription dispensed by the pharmacist, but for an entirely different purpose. Given that the pharmacist did not act in a way that impaired the ability of the patient to act voluntarily, and did not share in her objective, she is not complicit in the act, done entirely of the latter’s own volition.<sup>12</sup>

The account I have offered to replace that of Kutz’ also has as a key strength that it is better equipped to capture the reality of the collective endeavors we partake in, or at least the most significant ones. Most of the collectives we participate in are not straightforwardly monistic. Hume’s observation about property can be generalized: the corporation, the state, language, and (most relevant for our purposes here,) healthcare regimes, are all *artifices*. The value they have is entirely a function of the fact that others understand the relevant conventions, and the terms of engagement with these conventions. In the case of property, Hume notes that the *convention* of abstaining from simply taking the possessions of others, ensures that this artifice achieves a sort of “stability” that allows it to be efficiently used by individuals.<sup>13</sup> To put it differently, this means that the convention simply supplies the occasion for individual projects to be pursued. We use the artifice for our own purposes, and benefit when others do the same, precisely because this pooling of resources to establish a convention, makes what would otherwise be difficult or impossible to achieve, attainable in a timely and less cumbersome fashion.

What this does not entail is that the collective has some overarching purpose that all individuals participating in it thereby assent to. Our uses of property are “modular,” to put it in the terms I deployed earlier. My use of property for a morally problematic purpose does not thereby condemn any other individual who is merely following the conventions associated with property, and thus participating in

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<sup>11</sup> In complicity doctrine in criminal law, this is called *modus actus interveniens*.

<sup>12</sup> This example only works *ceteris paribus*; it assumes of course that the pharmacist had no knowledge of the patient’s horrible intentions, and could not reasonably have been expected to know.

<sup>13</sup> David Hume, *A Treatise of Human Nature* edit by David Fate Norton and Mary J. Norton (2000) pp. 314-315.

this collective endeavor. For instance, if I use a car I own to commit a murder by running over someone, *it is the purposes for which I am using the artifice* that is problematic rather than the artifice itself. It would be a conceptual error to impute ‘violent murder’ to be a goal of property in an overarching sense in order to find someone completely uninvolved in this murderous episode of mine to be complicit.

## VI Applying the revised account of collective action to PAD

With these thoughts in mind, let me return to the prior discussion of conscientious objection to PAD. Some conscientious objectors have contended that any positive requirement on them to participate in PAD *in any form* is morally impermissible, given that it would render them complicit. However, I submit that what has been said above sheds some light on the veracity of this claim, and ultimately finds it to be unfounded. We can illustrate this with the example of referral, which has drawn resistance from conscientiously objecting physicians. When providing a referral, a physician’s end (even one that has a conscientious objection) is ensuring patient access to a legally available service. The means to both ends overlap accidentally; the physician need not (and practically speaking, could not) will *all* the goals that her act of providing a referral could serve to facilitate. She certainly provides the means to assisted death, but need not endorse its end.<sup>14</sup> This in other words, is the ‘amoral marketplace’ Kutz touches on above. The physician and patient’s different moral projects are pursued independent of each other, except for an amoral overlap in a healthcare regime that happens to be the occasion for both their projects. This point of contact between the endeavours of both agents (physician and patient requesting PAD) is morally neutral precisely because it is the independent action of the patient *after* receiving the referral that breaks the chain of complicity that the conscientious objector worries about. The referral does not literally drag the patient to the willing provider; the patient will still have a series of deliberations before and after consulting the latter, and at the very least exercises some of their own agency in deciding to go through with the appointment provided by the referral.

Underlying this claim is the notion that we cannot police the uses of our contributions to a system if we accept that others have the capacity to structure their actions in accordance with their comprehensive doctrines. This is the realm of moral freedom a liberal regime works to ensure. Moreover, we cannot frame our discussions of complicity by imputing a morally problematic goal to certain types of collectives, such as a healthcare regime, and then work backwards from this assumption to condemn

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<sup>14</sup> Here, I accept for the sake of argument that a referral is a ‘means’ to assisted death. I am hesitant to entirely endorse this, as it seems to assign it a special status as ‘facilitation’ to assisted dying. However there are reasons to doubt that it should have this special status anymore than a physician making a patient aware that assisted death is a legally available option. It seems that ‘but for’ the provision of either (providing information or the referral), the patient would not be able to access PAD, unless the patient took it upon themselves to find out about it of course – both are causally necessary steps.

individuals. In this vein, if, as conscientious objectors, we demand that all uses of a healthcare regime harmonize with our own moral commitments, we are attempting to reframe what is itself the *possibility* for diverse projects, to have a single, monistic goal to which we must all thereby assent. Our political frameworks have suggested to us that this is not only impossible, but also undesirable.

## Gender-Reassignment Surgery: Should it be Commodified?

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Adrienne Row-Smith

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### I Introduction

In health care, discussions about what ought and ought not to be for sale are important in determining the levels of state intervention and assistance for health coverage and surgeries. In general—not just in healthcare—the outcomes of such discussions can lead either to the state listening to anti-commodification theorists (and considering attendant policies of regulation), or to a freer market (partly in hopes of reducing black market enterprises). While questions regarding sex work and commercial surrogacy have been at the forefront of such debates, gender affirmation surgery is just as important to the commodification debate. Currently, the Government of Canada’s system for processing gender affirmation surgery requests is to some degree state-operated and state-run, but it is also privatized. This is problematic as it puts more onus upon an already marginalized community to prove that gender affirmation surgeries can be designated as a “course of life need.”<sup>1</sup> Furthermore, transgender individuals that are seeking surgery as a means to “pass” or blend into the heteronormative society, enter into a system that has long waits and large medical expenses that they sometimes have to cover out of their own pockets.<sup>2</sup> Should the state have to pay the bill for that process? Should the state provide compensation at all?

In this paper, I will argue that the current system that transgender individuals must navigate is corruptive, and that it causes third party and social harms. I will show that the current state system in Canada has an internal coherence failure—that it ascribes a value to a good but uses a principle of distributive justice that does not add up to it.<sup>3</sup> To show how gender affirmation surgery is something that ought not to be for sale, this paper will be split into five sections. In section one, I will define what is a commodity and market, and how they are to be applied in this context. In section two, I address the good in question, specifically what is gender affirmation surgery, how it works, and how it is commodified. In section three, I deal with trans bodies as a commodity and highlight how they are harmed through this system. In section four, I present and consider an argument against my anti-commodification of gender affirmation

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<sup>1</sup> Norman Daniels, “Health-Care Needs and Distributive Justice,” (1981) 10(2) *Philosophy & Public Affairs* 153.

<sup>2</sup> M. Dunne, “Want Sex Reassignment Surgery in Canada? Be Prepared to Wait for Years,” *Yahoo Canada* (24 July 2015) <https://ca.news.yahoo.com/blogs/dailybrew/want-sex-reassignment-surgery-in-canada--be-prepared-to-wait-for-years-173327959.html>

<sup>3</sup> M. Waltzer, *Spheres of Justice* (New York: Basic Books, 1998) 17.

surgery, and see that there is no problem with market norms invading the health care and surgical sphere. Finally, in section five, I will advocate for a restructuring of the surgery process that applies universally to all provinces and territories. This system will recognize gender affirmation surgery as a necessary process that will allow trans bodies to have decency and dignity. I will conclude by showing how the change in structure will impact our sphere of welfare, in that it will reduce corruption of relationships and furthermore, reduce third party harms as a byproduct due to the lack of access.

## II What is a Commodity and What is a Market

Before I begin my argument, it is important to have a clear definition of what a commodity is, and specifically how gender affirmation surgery fits into this category. A commodity is an object that can be exchanged for a value to satisfy a preference or need. Therefore, a market is the avenue in which people can exchange monetary value for objects that fulfill their needs, such as food or clothing, or preferences such as videogames. In regards to my argument, the commodity in question is human bodies and specifically transgender bodies. The market includes the private medical offices that offer gender affirmation surgeries, and the government, which controls access to the surgeries.

Gender affirmation surgery fits into this category, because it is something that individuals seek not only as a need, but also as a preference for which they are willing to pay. The realms of needs and preferences can be intertwined, just as in prostitution and commercial surrogacy. This poses problems for the market in gender affirmation surgery because the good in question is no longer clearly defined. Purchasing and navigating this system leads to an investment in one's own body, which will fulfill their needs and allow them to attain human dignity and realization of themselves.

Being able to purchase and have gender affirmation surgery can be understood as a cure to a disease. In this case the disease is gender dysphoria.<sup>4</sup> This is supported by Norman Daniels' paper *Health Care Needs and Distributive Justice*, where he states that a disease is a deviation "from the natural functional organization of a typical member of a species."<sup>5</sup> Daniels also includes deformities and disabilities that result from trauma under this category.<sup>6</sup> The Centre for Addiction and Mental Health deems that anyone seeking gender affirmation surgery must be classified as having gender dysphoria, which is when the

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<sup>4</sup> Centre for Addiction and Mental Health ('CAMH'), *CAMH: Gender Identity Clinic: Criteria for Those Seeking Hormones and/or Surgery*, (2015) 1. [http://www.camh.ca/en/hospital/care\\_program\\_and\\_services/hospital\\_services/Pages/gid\\_criteria\\_hormone\\_surgery.aspx](http://www.camh.ca/en/hospital/care_program_and_services/hospital_services/Pages/gid_criteria_hormone_surgery.aspx)

<sup>5</sup> Daniels 155.

<sup>6</sup> Ibid.

gender expressed by an individual differs from the gender that others would ascribe to her.<sup>7</sup> Therefore, gender affirmation surgery fits into Daniels' category of disease and can be treated medically.

Furthermore, Daniels describes a difference between “course of life needs” and “adventitious needs”, which can help determine what the state can cover and provide medically and what it cannot.<sup>8</sup> Course of life needs are needs that people will “have all through their lives or certain stages of life through which all must pass.”<sup>9</sup> Adventitious needs are needs that are based on “particular contingent projects” that are specific to each individual.<sup>10</sup> Course of life needs are independent of any projects or goals that people specifically have, while adventitious needs are dependent on specific goals of each individual. Given this definition, gender affirmation surgery may be classified as adventitious for transgender individuals. This is due to the fact that there are trans individuals who can live a happy life without reconstructive surgery, or that they do not wish to have any surgeries done. This allows for gender affirmation surgery to be considered a medical condition, but it also creates a division between what is and is not covered by the government, and so what is outside the government sphere—i.e., what is a part of the market exclusively.

### III Problems with the Good in Question

The classification of gender affirmation surgery as an adventitious need is furthered when it entails a “subjective criterion”, which relies upon an individual’s personal “assessment of how well-off he is with or without the claimed benefit.”<sup>11</sup> Because a majority of citizens are not transgender, individuals that are trans have to prove that gender affirmation surgery for them would fulfil “an objective criterion”, that the surgery “invokes a measure of importance independent of the individual’s own assessment.”<sup>12</sup> Currently, this is shown through multiple visits with the family doctor, a state approved psychiatrist, and a state-designated gender affirmation surgeon. The problem with accessing these services is that there are too few “doctors and surgeons specializing in the field.”<sup>13</sup> For example, in the entire province of Alberta there are only two doctors, “both located in Edmonton, who can do an evaluation and decide if someone is eligible for surgery.”<sup>14</sup> The waitlist to see these doctors is long, and if an individual does finally see a doctor, then they are usually referred to the Centre Métropolitain de Chirurgie Plastique based in

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<sup>7</sup> E. James-Abra, “The Road to Inclusion: Transgender Health Care in Canada” *The Canadian Encyclopedia* (2001). <http://www.thecanadianencyclopedia.ca/en/article/the-road-to-inclusion-transgender-health-care-in-canada/>

<sup>8</sup> Daniels 152-153.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid 153.

<sup>11</sup> Daniels 150.

<sup>12</sup> Ibid.

<sup>13</sup> Dunne 1.

<sup>14</sup> Ibid.

Montreal.<sup>15</sup> The Centre in Montreal sees not only Canadian patients, but patients from around the world. Their wait times are extremely long due to the high demand for these surgeries.<sup>16</sup> This highlights that there is a market failure, that the distribution is only available to those who have the time to wait or can exit that market and pay for services outside the country priced upwards from \$20,000.<sup>17</sup>

Furthermore, statistics highlight problems for those unable to access these services, which helps to prove that this surgery is in actuality a course of life need. Egale, the Canada Human Rights Trust, has found that “70% of trans youth (19-25 years), have experienced discrimination or have been treated unfairly by others in Canada because of their gender identity.”<sup>18</sup> Some would argue that a solution to this problem would be to have more stringent human rights laws and more thorough prosecution of those who commit these crimes against trans individuals. However, Egale goes on to say that “69 % of older trans youth” contemplated suicide, with “37% trying to commit suicide at least once in their lifetime.”<sup>19</sup> This shows that the problem runs much deeper than simple law reform, and that the state should consider allowing surgery, as these statistics show that surgery may not be just an adventitious need. Rather, at the same time, it can also be a course of life need. This is reflective of the current state systems, such as OHIP, which cover some surgeries but not all that a trans individual may need.<sup>20</sup> By classifying surgeries as adventitious needs, it creates third party and social harms.

The problem of gender affirmation surgery becomes further complicated as surgeries can fall into differing categories based on the province in which an individual resides. For example, the province of Ontario only covers the reproduction reconstruction surgeries, and does not cover “breast implants, facial surgeries, [or] neck or vocal cord surgery.”<sup>21</sup> It is also important to note that hormone therapy, which allows the user to inject themselves with hormones to achieve the psychological gender that they are, is not covered by any of the provinces.<sup>22</sup> By not covering all necessary surgeries, transgender individuals are

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<sup>15</sup> Ibid 2.

<sup>16</sup> Ibid 2-3.

<sup>17</sup> Ibid 2.

<sup>18</sup> Egale, *Egale’s Message to Legislators on This Trans Day of Remembrance*, (2015) 3. <http://egale.ca/observing-trans-day-of-remembrance/>

<sup>19</sup> Ibid.

<sup>20</sup> Ontario, Ministry of Health and Long Term Care, *Relisting of Sex Reassignment Surgery Under OHIP*, (2015) 1. <http://www.health.gov.on.ca/en/pro/programs/ohip/bulletins/4000/bul4480.pdf>

<sup>21</sup> Rainbow Health Ontario, “Information on Sex Reassignment Surgery (SRS) and Trans Health Care in Ontario,” (2015) 2. [http://www.rainbowhealthontario.ca/wp-content/uploads/woocommerce\\_uploads/2014/08/CommunicationonSRSandTransHealthinOntario.pdf](http://www.rainbowhealthontario.ca/wp-content/uploads/woocommerce_uploads/2014/08/CommunicationonSRSandTransHealthinOntario.pdf)

<sup>22</sup> W. Glaser, J. Goliath and V. Yiu, “Health care system stigmatizes and discriminates against transgender people,” *Health Debate* (2015). <http://healthydebate.ca/2015/07/topic/transgender-health-access>

further commercialized, not only in that those of them who desire or need surgery, but also with respect to the medication to maintain who they are.

These complications show how the market has played a significant role in gender affirmation surgery as a commodity. This highlights the government's shortcomings, and it shows how the sphere of health care principles and guidelines has become overshadowed by market norms.<sup>23</sup> Yet, the market has not fixed the problems of the government system. Rather, it has created a more complicated system that transgender individuals must navigate.

#### **IV Trans Bodies and the Impact of Commodification**

The problems show how differing views about commodification of transgender bodies can affect not only the individual, but society as a whole. Similar considerations that are given to prostitution and commercial surrogacy are necessary to determine whether or not transgender bodies should be conceived as commodities. In her paper, *It's My Body and I'll Do What I like with It*, Anne Phillips shows the problems with considering bodies as property, and how language that we use regarding bodies can play a significant role in how we determine what ought or ought not to be for sale. Phillips recognizes that people do certain kinds of things because of their interests and skill sets.<sup>24</sup> This makes sense in regards to the doctors and surgeons. However, in the case of gender affirmation surgeries the mentality is different. Gender affirmation surgery is a certain job that only a select few want to do.<sup>25</sup> It implies that there is something wrong with this type of work, and that therefore no one wants to work in this field. This mentality affects how the system is structured, because the cost of surgeries is reflective of the time and effort that goes into these procedures and to meet an undesirable demand. Therefore, the prices and wait-times become reflective of society as a whole, as it does not see the crisis of having a trans identity as something paramount. It shows that people who are willing to pay for this service must be beneath society, and that therefore this is the only way in which transgender individuals can become equal.

This corruptive mentality is furthered when we refer to the body as a piece of property, as "it builds metaphorical walls around the self, constituting others as threats to one's freedom."<sup>26</sup> This results in an "individualism that seriously understates the chain of interdependency constituting human relations and

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<sup>23</sup> Walzer 17.

<sup>24</sup> A. Phillips, "It's My Body and I'll Do What I Like With It: Bodies as Objects and Property," (2011) 39(6) *Political Theory* 737-738.

<sup>25</sup> Ibid 738.

<sup>26</sup> Ibid 728.

discourages collective ways of addressing the problem.”<sup>27</sup> In regards to gender affirmation surgery, this means that the transgender individuals can be forced deeper into their gender dysphoria when they are made to jump through hoops in an effort to construct themselves so that their physical being matches their mental persona.

This leads to equality becoming contingent, because it becomes “analogous to any material resource.”<sup>28</sup> By allowing markets into the patient and physician relationship, it produces an inequality between patient and physician. This results when the patient lacks something needed and the physician is the only person who can provide it.<sup>29</sup> This is exemplified by the two plastic surgeons in Montreal, who are forced to foster this inequality due to market norms and the government system failing to meet the needs of many people. The benefit to this is that some individuals exit the market, and seek surgeries elsewhere.<sup>30</sup> However, not everyone has that luxury.

When transgender individuals attempt to navigate this system, they must refer to pieces of themselves in monetary values. This exposes a problem in which the individual becomes disassociated from their being, because there is a price tag attached to it.<sup>31</sup> This disassociation works in the case of sex workers, who are offering their bodies to consumers. However, in the case of transgender individuals, they are both the consumer and a seller. This creates a cognitive dissonance, as they must now refer to themselves in economic terms in order to be themselves. The results of this cause third party harms, and a corruption of social relations because the individual cannot be themselves during this process. Furthermore, the people they must interact with may not seem to be individuals, but merely the parts that need to be altered. Doctors, and surgeons in this field either willingly, or by force, view these surgeries and the patients in economic terms, due to either personal beliefs or because they must use cost benefit analysis.<sup>32</sup> This results in a corruptive relationship between patient and physician, as the relationship becomes marred by market norms. This does not benefit those involved in the transaction, but benefits the market system as a whole. Therefore, this exposes that the health care sphere has become overridden by the market sphere. Michael Walzer discusses this issue in his paper *Spheres of Justice*, as he explains that when the wealth guidelines intervene in a sphere that ought not to follow them, it corrupts the sphere.<sup>33</sup>

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid 729.

<sup>29</sup> Ibid 737.

<sup>30</sup> Dunne 2.

<sup>31</sup> Phillips 729.

<sup>32</sup> Glaser, Goliath and Yiu, 2015.

<sup>33</sup> Walzer 18.

The corruption of the sphere's guiding principles leads to third party and social harms. Third party harms arise when "operations of some markets lead to outcomes that are deleterious."<sup>34</sup> In the case of gender affirmation surgery, the deleterious outcomes are the high cost of the surgeries and the long wait times. This results in patients having to either wait and face continued discrimination until they can have the surgery, or exit the market and seek surgeries elsewhere.<sup>35</sup> While this allows some individuals to avoid harms to themselves, the third party harms make this a more significant concern. The third parties that are harmed due to this structure are transgender teens. In order to be approved for surgery, the Centre for Addiction and Mental Health requires that individuals be 18 years of age, must be on hormones, and complete a "GRE" (gender role experience).<sup>36</sup> Transgender teens are excluded by this classification, because family doctors can only prescribe them hormone blockers. They must wait until they are the age of majority in order to start their transition process. They are the externalities, because of their inability to access services that would allow them to conform to standards. Egale found that "37% of trans students have been physically harassed or assaulted because of their gender expression."<sup>37</sup> Therefore, commodification and the current regulation system promotes third party harms; the system fails to provide certain individuals access to the market.

Some would say that the solution lies in a more distributive process, that having more doctors and surgeons specialize would reduce the wait times and therefore remove the paying out of pocket situations. However, this fixes only one aspect of the problem. This does not remove the aspects of thinking of the body in monetary terms. The state system would still act as a barrier to those who could not afford the traveling and recovery costs. Furthermore, it does not account for a portion of the trans population that must wait, not only because of a backlog in the process, but because the system cannot account for relevant teens.

Therefore, the market in gender affirmation surgery is a failure. It fails to meet the demands of participants, and it is exclusive and generates inequalities that cause greater harms than the risks of surgery. These factors show that there may not be a substantial case for the commodification of gender affirmation surgery. They show that it is likely better for gender affirmation surgery to be considered a course of life need for transgender individuals, and that the cost of surgery ought to be covered by the state.

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<sup>34</sup> D. Satz, *Why Some Things Should Not Be For Sale*, (New York: Oxford University Press, 2010) 94.

<sup>35</sup> Dunne 2-3.

<sup>36</sup> CAMH 1.

<sup>37</sup> Egale 3.

## V      **Objections to the Anti-Commodification Position**

While I show that the market in gender affirmation surgery is not the ideal option, there are those who would disagree. Jason Brennan and Peter Jaworski argue that “if you may do it for free, then you may do it for money” in their book *Markets Without Limits*.<sup>38</sup> Their argument suggests that my argument does not prove that gender affirmation surgery cannot be sold; it does not fit into their three limits on the market. My argument would not fit into the *limits due to principle of wrongful possession*, because gender affirmation surgery does not classify as something “that people inherently should not have.”<sup>39</sup> Gender affirmation surgery is not child porn, as it is not something that is morally and legally wrong to have or do (although some countries would say otherwise), and therefore a market should be allowed. Furthermore, it does not fit into *incidental limits to the market*, which “are cases where particular people should not sell particular things—things that normally would be permissible.”<sup>40</sup> Gender affirmation surgery does not entail that transgender people will use their new body to commit crimes; rather it empowers people in a positive way and therefore there can be a market in it. Finally, gender affirmation surgery would not classify as *inherent limit to the market*, because Brennan and Jaworski do not believe that that is possible.<sup>41</sup>

Brennan and Jaworski believe that having a market in gender affirmation surgery is morally permissible. In their book, they would classify my argument as dealing with the corruption and semiotic nature of the market of gender affirmation surgery. They would easily refute my argument against a market, based on the fact that I believe markets can corrupt goods. Brennan and Jaworski believe that if there is a relevant problem, the fix will not be found in preventing certain things from being sold, but rather the features under which those things are sold need to be altered.<sup>42</sup> In other words, they believe that arguments about what ought and ought not to be sold need to not focus on the content of the good, but rather on whether the circumstance surrounding the good impacts its sale.

I disagree with Brennan and Jaworski because their argument is only plausible with goods that have a contingent social meaning. There are some goods that are created based on their social meaning, and that when we refer to them in neutral terms, an opportunity for exploitation and corruption is created. This is already evident in gender affirmation surgery, where patients have to pay thousands of dollars for a good that would promote an accurate gender expression. This gives gender affirmation surgery a social

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<sup>38</sup> J. Brennan and P. Jaworski, *Markets Without Limits: Moral Virtues and Commercial Interests* (Routledge, 2015) 10.

<sup>39</sup> *Ibid* 15.

<sup>40</sup> *Ibid* 15.

<sup>41</sup> *Ibid* 16.

<sup>42</sup> *Ibid* 39.

meaning, and to remove that meaning sends a message to cisgender individuals that transgender bodies lose their human dignity and worth when they decide to go through with surgery. This can and has led to discrimination against transgender individuals, which has resulted in some losing their jobs, families and, in extreme cases, their lives.<sup>43</sup> Therefore, Brennan and Jaworski's argument can open a gateway for justification of transphobic-based violence, and continue to reinforce the current system to be more stringent and a barrier for transgender people.

However, there are important points in their book that can be of use to restructuring the system to make attaining gender affirmation surgery more of a valid concern. In chapter 17 of *Markets Without Limits*, Brennan and Jaworski highlight the problem pertaining to queues. They use the example of waiting in line for tickets for public theatre performances to show that it is unfair to distribute tickets based on time. They believe that it should be okay for individuals to choose whether they will pay for someone to wait in line, or that they can wait for a ticket themselves, but the box office should not regulate that method.<sup>44</sup> While I disagree with the argument promoting paying people to buy tickets, there is something important to take from the argument overall. Distribution based on time is just as unfair as distribution based on pay. These are the primary methods used in the structure to provide gender affirmation surgery, and those methods have been proven to be insufficient. Therefore, while I disagree with Brennan and Jaworski overall, they do provide an asset to my argument.

## **VI Conclusions and Solutions to Move Beyond the Market**

In this paper, I have shown the problems with a market in gender affirmation surgery. The current structure promotes a system that only benefits a select few, and leaves others to find alternative methods in order to achieve the proper gender expression. Furthermore, the system fails to recognize the full importance that surgeries have, and should be deemed course of life needs. Instead, the system classifies them as adventitious needs. Again, this promotes inequality as only those that can pay out of pocket can access these services. I have shown that the current system promotes cognitive dissonance in the transgender individual, that the market in gender affirmation surgery forces individuals to think of themselves not in terms of personhood, but instead in economic terms. This highlights that market norms, principles and guidelines have overrun the health care sphere, which has resulted in a system of surgeries that few can access successfully. The market in gender affirmation surgery is exclusive and causes more harm than good. These harms are not only done to individuals attempting to navigate the system, but also to those who are not legally allowed to access the services. Furthermore, the system affects the social

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<sup>43</sup> Egale 1-2.

<sup>44</sup> Brennan and Jaworski 162.

meaning of what it is to be human, as individuals are denied the right to express themselves merely due to the lack of finances or age. This is reflective of a society that favours cisgender individuals over transgender individuals, and seems to present an argument against a market in gender affirmation surgery.

Therefore, the state should do everything it can to provide for transgender individuals, so that they do not have to seek and navigate services elsewhere. I believe that there ought not to be a monopoly by private business in gender affirmation surgery. Instead, the state should have a more controlling role and provide better services for transgender citizens. The system I propose would result in what Satz called “pareto optimum”, where both customers and suppliers come out of the exchange for the better.<sup>45</sup> Therefore, the new system should move away from markets in the sense that ability to pay is not the focus, and instead based upon meeting and fulfilling needs. In order for this to happen, the state would have to train more doctors in this field, and they could do this through providing incentives for pre-existing doctors and surgeons in the general field. Furthermore, the state should require medical schools to train potential doctors and surgeons in how to manage and work with transgender patients.<sup>46</sup> The effect of this would result in screening for doctors whose own personal moral beliefs may affect proper treatment for transgender patients, and can remind them of the true purpose of their profession. This will reduce corruption, as the patient’s interests will be legally recognized over a doctor’s discomfort, and prevent doctors from gatekeeping. Furthermore, training family doctors to understand the trauma and lives lived by transgender people will make them more comfortable with prescribing their transgender patients with hormone therapy.<sup>47</sup>

The state would also have to change requirements surrounding this surgery, as the onus should not be on a patient to prove the necessity of this service. The state should look at it from the perspective of what it is able to provide and do for its citizen. If the state is unable to provide complete coverage, then it should at least attempt to meet patients half way. However, it has been shown that the cost of surgeries outweighs the constant medical coverage that a transgender patient will need. *The Atlantic* found that if insurance companies covered gender affirmation surgery, that they would be saving USD 10,712 a year, a cost that “stems from the risk of depression, drug abuse, and other problems transgender people tend to face without treatment.”<sup>48</sup> Therefore, it is in the state’s interest to economically finance these surgeries.

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<sup>45</sup> Satz 17.

<sup>46</sup> Glaser, Goliath and Yiu, 2015.

<sup>47</sup> Ibid.

<sup>48</sup> J. Beck, “Covering Transgender Health Care Is Good Economics for Insurance Companies,” *The Atlantic* (1 December 2015). <http://www.theatlantic.com/health/archive/2015/12/covering-transgender-health-care-is-good-economics-for-insurance-companies/417804/>

These are only some ideas to make the current gender affirmation surgery structure better. I brought these ideas forth in an effort to show that the state can do better for its citizens. In conclusion, my argument shows that the market does not have to have a significant role in the realm of gender affirmation surgery. Rather, there ought not to be a market in it at all.

## SECTION III: LAW & THEORY

### Targeted Killing in International Law: An Analysis of the Legality of the Bin Laden Raid

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Ben Fickling

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#### I Introduction

On the 2<sup>nd</sup> of May 2011, the United Nations Security Council ('UNSC') produced a statement discussing the death of Osama Bin Laden and greeting it as a favorable outcome; however, it balanced the statement with a pledge that "measures taken to combat terrorism ...[should be] under international law."<sup>1</sup> The statement exemplifies the position targeted killing holds within the international community: often, its outcomes are morally desired but its position in international law ('IL') is, at best, unclear. The lack of a definition for 'targeted killing' ('TK') under IL exacerbates uncertainty regarding its legality.<sup>2</sup> The Special Rapporteur's report broadly defines targeted killing as "the intentional, premeditated and deliberate use of lethal force by States or their agents...against a specific individual who is not in the physical custody of the perpetrator."<sup>3</sup> Some scholars have argued that TK, as a result, promotes an ambiguous mix of law enforcement and warfare. The individual in question is punished "on the basis of individual guilt" rather than combatant status and receives no due process.<sup>4</sup>

As there is no definitive convention on TK but rather a multitude of regulations on armed conflict, where it may be justified or condemned, the facts of the case are pertinent. Bin Laden was found in a fortified enclosure hiding out in Abbottabad, Pakistan near to the Pakistani Military Academy.<sup>5</sup> US Navy Seals consequently conducted a raid in which Bin Laden was shot and killed *unarmed*, with multiple shots to the chest and head.<sup>6</sup>

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<sup>1</sup> Gray, Christine. "Targeted Killings: Recent US Attempts to Create a Legal Framework." *Current Legal Problems* 66 (2013): 75-106. *Advance Access*. Web. 3 Mar. 2016, 76

<sup>2</sup> Alston, Phillip, ed. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*. Rep. New York: United Nations Human Rights Commissioner, 2010. [Http://www2.ohchr.org](http://www2.ohchr.org). Web. 3 Mar. 2016. <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>>., 4

<sup>3</sup> *ibid*, 3

<sup>4</sup> Chiesa, Luis E., and Alexander K.A. Greenbelt. "Beyond War: Bin Laden, Escobar, and the Justification of Targeted Killing." *Washington and Lee Law Review* 69.3 (2012): 1371-470. *ProQuest*. Web. 4 Mar. 2016, 1378

<sup>5</sup> Wallace, David A. "Operation Neptune's Spear: The Lawful Killing of Osama Bin Laden." *Israel Law Review* 45.02 (2012): 367-77. *Cambridge University Press*. Web. 3 Mar. 2016, 368

<sup>6</sup> Schaack, Beth Van. "The Killing of Osama Bin Laden and Anwar Al-Aulaqi: Uncharted Legal Territory." *Yearbook of International Humanitarian Law 2011 - Volume 14* (2012): 255-325. *ProQuest*. Web. 3 Mar. 2016, 259

Four general questions must be answered to determine the legality of Bin Laden's death. Is international humanitarian law ('IHL') the main operative body of law for targeted killings? Was the US use of lethal force in Pakistan legal? Consequently, was its use of lethal force against Bin Laden legal? Finally, did the US have a strict obligation, under international law, to capture and not kill Bin Laden?

This paper concludes that while IHL would be the most favorable body for TK to operate under, it requires extending established definitions of what constitutes a non-international conflict. Furthermore, the legality of the use of lethal force in a foreign territory is predicated on arguing that, absent consent, the category of self-defense as described in Article 51 of the UN Charter would allow for action against continuing acts of violence from a non-state actor. The assertion that Bin Laden was a lawful military target would depend on the status of al Qaeda as an organized armed group as well as Bin Laden's ability to meet International Committee of the Red Cross's ('ICRC') continuous combat test on the basis of his own activities, *not* his leadership role. The US arguably had a responsibility under the ICRC theory upholding the use of the least restrictive means to capture and not kill Bin Laden; however, a deference given militaristic aims can inspire an observer to side with the perpetrator. Ultimately the facts of Bin Laden's death are still unclear, and to discuss its legality requires some degree of speculation about what might have transpired.

## II International Humanitarian Law: Primary Operative Body?

For international humanitarian law, or the laws of war, to be the primary operative body for the Bin Laden raid, would be the best-case scenario for the US. However its effectiveness depends on whether understandings of non-international conflict may be expanded to meet transnational threats like al Qaeda. IHL is composed of four Geneva Conventions and other subsequent treaties;<sup>7</sup> it regulates the use of force during armed conflicts.<sup>8</sup> One of its operational requirements, unsurprisingly, is that an accepted form of armed conflict is occurring at the time.<sup>9</sup> IHL recognizes two kinds of armed conflict: international armed conflicts that are between two or more states and non-international conflict between governmental forces and organized armed group(s) or between those groups only.<sup>10</sup>

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<sup>7</sup> Elfström, Amanda. *The Killing of Osama Bin Laden, Was It Lawful?* Thesis. Orebro Universitet, 2011. N.p.: Hossterminen, 2011. Print, 12

<sup>8</sup> Wong, Meagan S. "Targeted Killings and the International Legal Framework: With Particular Reference to the US Operation against Osama Bin Laden." *Chinese Journal of International Law* 11.2 (2012): 127-63. *ProQuest*. Web. 3 Mar. 2016, 132-3

<sup>9</sup> Henderson, Christian. "Assassination and Targeted Killing - The Killing of Osama Bin Laden." *International and Comparative Law Quarterly* 60 (2011): 778-88. *ProQuest*. Web. 3 Mar. 2016. 779

<sup>10</sup> Wallace, 370

While consensus on what comprised threats to peace and security evolved to include terrorism post-9/11, the concept of what defined armed conflict under IHL unfortunately remained unchanged.<sup>11</sup> The US Supreme Court's conclusions in *Hamdan v. Rumsfeld*, portrayed the war against al Qaeda in Afghanistan as a non-international armed conflict ('NIAC') under Common Article 3 of the Geneva Conventions;<sup>12</sup> this has compelled some scholars to suggest that the definition of NIAC should be expanded to meet the realities of war against a non-state actor. For example, some have pointed to the "porous border between Afghanistan and Pakistan," which promotes transnational operations conducted by the terrorist group,<sup>13</sup> and ultimately hinder the US in its ability to fight the War on Terror ('WOT'). Practical solutions amount to the prevailing, but not necessarily legal, view that should the conflict occur in a second state, consent is the primary issue. If the second state were to give consent to the state party involved, the conflict would maintain its NIAC nature, regardless of borders.<sup>14</sup> While in line with controversial perspectives that would allow IHL to govern NIAC transnationally, based on following "warring parties wherever they go,"<sup>15</sup> this could have profound political effects on vulnerable states that might give consent under compulsion of major powers states, without IL's ability to intervene.

There are other bodies of IL that must be considered in the case of the Bin Laden raid. International human rights law ('IHRL'), for example, would arrive at very different conclusions on the legality of the TK. Determining IHRL's operative relationship with IHL would effectively conclude which body of IL is applicable to the Bin Laden raid. IHL, as shown above, has requirements that must be met in order to determine its applicability, specifically whether an armed conflict has occurred. When the case at hand fails to meet such criteria, the main operative body, by default, becomes IHRL.<sup>16</sup> The International Court of Justice ('ICJ') has decided more than once that States are essentially constrained by IHRL when operating outside of their sovereign territory<sup>17</sup> and the Bin Laden case could apply, if we are to reject the expanded definition of NIAC. Under IHRL, 'targeted killing' by states is only legal "if it is required to protect life (making lethal force proportionate) and there is no other means, such as capture or non-lethal incapacitation."<sup>18</sup> The application of Article 6 of the International Covenant on Civil and Political Rights

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<sup>11</sup> Schaack, 286-7

<sup>12</sup> Vlasic, Mark. "Assassination and Targeted Killing - A Historical and Post-Bin Laden Legal Analysis." *Georgetown Journal of International Law* (2011): 259-333. *ProQuest*. Web. 3 Mar. 2016, 322

<sup>13</sup> Paust, Jordan J. "Permissible Self-Defense Targeting and the Death of Bin Laden." *Denver Journal of International Law & Policy* 39.4 (2011): 569-83. *ProQuest*. Web. 3 Mar. 2016, 571

<sup>14</sup> "Qualification of Armed Conflicts." *Rule of Law in Armed Projects*. Geneva Academy of International Humanitarian Law and Human Rights, 2016. Web. 3 Mar. 2016. <[http://www.geneva-academy.ch/RULAC/qualification\\_of\\_armed\\_conflict.php](http://www.geneva-academy.ch/RULAC/qualification_of_armed_conflict.php)>.

<sup>15</sup> Schaack, 288

<sup>16</sup> Wong, 157

<sup>17</sup> Elfstrom, 41

<sup>18</sup> Report of the Special Rapporteur, 11

(‘ICCPR’) specifically “[n]o one shall be arbitrarily deprived of his life,” would necessitate a discussion of whether Bin Laden’s killing was required for the protection of others or whether there were other non-lethal measures that could have been pursued to achieve the same objective. Once again, this is determined by the facts of the situation, but we have differing accounts on Bin Laden’s attempts to evade capture during the raid, and differing weights given to al Qaeda and Bin Laden’s role in the organization at the time.

It is possible that IHL and IHRL could be equally applicable in the case of Bin Laden; its relationship would consequently be dependent on the theory one favored. Some scholars have argued that IHL as *lex specialis* overrides IHRL in matters of armed conflict.<sup>19</sup> This has certainly been the position of the US government in its conflict with al Qaeda,<sup>20</sup> while the Human Rights Committee has argued that the two bodies are not necessarily mutually exclusive but complementary.<sup>21</sup> Regardless of whether IHRL applies independently or concurrently with IHL, its strict position on the legality of TK would only make it more likely that the Bin Laden case would not meet legal requirements, specifically with regards to capture than kill.

### III Legality of Use of Lethal Force in a Foreign Country

The raid on Bin Laden represents a breach of Pakistani sovereignty that may only be considered acceptable for three reasons: consent, UNSC authorization, and a state’s right to self-defense in Article 51.<sup>22</sup> Sovereignty has been respected as an inherent right of the state since the Peace of Westphalia of 1648, Article 2(4) of the UN Charter, reinforces this commitment; as the article states “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity.”<sup>23</sup> Prima facie, the US military intrusion and subsequent use of force in a territory not their own would represent a violation of this article and its explicit moratorium on the use of force outside of the UN.<sup>24</sup>

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<sup>19</sup> Schaack, 305

<sup>20</sup> Wong, 130

<sup>21</sup> Henderson, 784

<sup>22</sup> Wachtel, Howard A. "Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy." *Duke Law Journal* 55 (2006): 677-710. *ProQuest*. Web. 3 Mar. 2016, 689

<sup>23</sup> "Chapter I | United Nations." *UN News Center*. UN, n.d. Web. 10 Mar. 2016. <<http://www.un.org/en/sections/un-charter/chapter-i/>>.

<sup>24</sup> Cerone, John. "Raid on Bin Laden and the Consequences for Sovereignty and the UN Charter." *ASIL Proceedings* (2013): 47-51. *ProQuest*. Web. 3 Mar. 2016.47

Consent is one method that the US could have used to protect Pakistani sovereignty,<sup>25</sup> however, Attorney-General Eric Holder surprisingly only mentions it once briefly.<sup>26</sup> Publicly, both the US and Pakistan have maintained that consent for the Bin Laden raid was neither asked from the former nor accepted by the latter.<sup>27</sup> Pakistani officials, privately however, have given differing accounts, suggesting that the US had informed the state officials just prior to the mission that they were on a mission for a 'high-value target.'<sup>28</sup> Indeed one could note that since 9/11 a pattern of unilateral US use of force had been exercised, with Pakistani acceptance;<sup>29</sup> General Musharraf accepted that Pakistan "had better join the angry United States after the attacks...than be identified as an opponent."<sup>30</sup> Gray identifies that the Inter-Services Intelligence would receive faxes informing the Pakistani officials that a drone attack would occur, and subsequently "clear the airspace."<sup>31</sup> Consent, while not publicly received, can be seen as having been demonstrated by the Pakistani military in its tacit acquiescence of clearing the skies, something that can likely be argued in support of the Bin Laden raid.

Some scholars have argued that regardless of consent, the US had a right to intervene, as Pakistan was either unwilling or unable to prevent the actions of al Qaeda, which actions were considered a significant threat to peace and security. Often these fragile states are used, as what Ahmed labels as "host states," where non-state armed groups like al Qaeda may prepare for attacks on "victim states" like the US.<sup>32</sup> While this argument has seen support in the UNSC, specifically in Resolution 1456, which affirms that those who support "or provide safe havens" would be prosecuted under IL,<sup>33</sup> this easily can translate into infringements on a weaker state's sovereignty simply because of suspected terrorist activity within the state. Cerone criticizes this position, when he suggests that the view originated in an outdated law of neutrality that had been in effect prior to the UN Charter itself.<sup>34</sup> In *Armed Activities of Congo* the ICJ stated explicitly that where grounds couldn't be found to connect a non-state actor's activities to the host

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<sup>25</sup> Ambos, Kai, and Josef Alkatout. "Has 'Justice Been Done'? The Legality of Bin Laden's Killing under International Law." *Israel Law Review* 45.2 (n.d.): 341-66. *Cambridge University Press*. Web. 4 Mar. 2016, 361

<sup>26</sup> Gray, 102

<sup>27</sup> Henderson, 787

<sup>28</sup> Vlastic 314

<sup>29</sup> Vlastic, 319

<sup>30</sup> Barak, Dan, Einar Yogev, and Yoram Schweitzer. "A Troubled Geostrategic Marriage." *Military and Strategic Affairs* 3.2 (2011): 33-47. *ProQuest*. Web. 3 Mar. 2016, 37

<sup>31</sup> Gray, 103

<sup>32</sup> Ahmed, Dawood I. "Defending Weak States Against the 'Unable or Unwilling' Doctrine of Extra-Territorial Self-Defense." *Journal of International Law and International Relations* 9 (2013): 1-37. *ProQuest*. Web. 3 Mar. 2016, 2

<sup>33</sup> Ambos, 363

<sup>34</sup> Cerone, 48

state, any use of force without consent would be illegal.<sup>35</sup> He reinforced this view years later, in the Wall advisory opinion.

Article 51, as stated previously, offers itself as an exception to Article 2(4) of the UN Charter and would justify US action within Pakistani territory.<sup>36</sup> While it would certainly offer a legal explanation for US actions, its application to non-state actors is unorthodox. Despite 9/11, the ICJ has maintained the position that the right of self-defense would only apply in cases of armed attack by another state.<sup>37</sup> Although the UNSC has recognized the right to self-defense against non-state actors, specifically regarding al Qaeda, it is still unclear whether there is consensus on this matter.

Another reason why self-defense may be problematic in its application to Bin Laden, specifically the act of the raid itself, is that Article 51 has, by most interpretations, been strictly limited to responses immediately after an armed attack.<sup>38</sup> However, the response that the US has sought against the non-state actor's leader occurred a decade after the actual attack. Resonant with the NIAC's expanded definition, Koh and others have sought to argue that al Qaeda has remained a continual threat and therefore the doctrine of self-defense cannot be given a time limit.<sup>39</sup> To some extent, this argument seems reasonable in that non-state actors may continually advance agendas that must be prevented; it has yet to be seen explicitly expressed in IL.

#### **IV Use of Force Against an Individual: Osama Bin Laden**

The US government in two respects has defended the use of lethal force with the argument of self-defense and its adherence to the IHL principles of necessity, distinction and proportionality. However, it arguably has failed to consider the possibility that Al Qaeda might not be considered at the time of Bin Laden's death an organized armed group and that Bin Laden may have lost his status under the ICRC's continuous combat function.

In his defense of US actions, Paust states that, legally, there are three groups that may be targeted: direct participants in armed attacks, civilians who are direct participants in hostilities and civilians who are engaged in a continuous combat function.<sup>40</sup> Ultimately Osama fails to be categorized in any of the three groups. If we are to entertain that the notion that the US is engaged in a NIAC with al Qaeda in both

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<sup>35</sup> Ahmed, 9

<sup>36</sup> Vlastic, 271

<sup>37</sup> Wong, 136

<sup>38</sup> Wachtel, 690

<sup>39</sup> Wong, 139

<sup>40</sup> Paust, 571

Afghanistan and Pakistan, according to Additional Protocols of the Geneva Convention, individuals may only be targeted based on their activities rather than status.<sup>41</sup> By default those who are not engaged in hostilities or armed groups are considered civilians and are, therefore, granted immunity from TK.<sup>42</sup> Most likely, the ambiguity of the facts could be said to grant an immunity to Bin Laden.

Organized armed group members may be targeted on the basis of their membership;<sup>43</sup> however, Al Qaeda, at the time of Bin Laden's death, has been considered by some scholars as lacking in the necessary structure of an organized armed group.<sup>44</sup> The ICTY in the *Limaj Case* were given the task of distinguishing what traits defined an organized armed group. They specifically highlighted the leadership that the General Staff exercised and "their assignment of tasks to individuals within the organization,"<sup>45</sup> implied a simple chain of command. However, scholars like Vinci have argued that al Qaeda operates much like a franchise, possessing a core membership and "up to 18,000 individuals" who are radicalized in al Qaeda training camps and returned to their home country.<sup>46</sup> Wallace concluded that at the time of Bin Laden's death, the terrorist organization lacked the military strength and centralized command structure that is often characteristic of organized armed groups.<sup>47</sup> Koh, as legal advisor, argued that "given Osama bin Laden's... leadership position within al Qaeda...there can be no question that he was the leader of an enemy force and legitimate target in our armed conflict with al Qaeda."<sup>48</sup> However this claim of leadership must be assessed in context of the group that Bin Laden aimed to govern. Should the terrorist organization lose its prestige as an armed organizational group, so too does it lose its status-based targeting of its membership.

Secondly, al Qaeda does not fit the criteria established in Article 4(A) (2) of the Geneva Convention; as a result, its members are considered civilians until such time as those individuals choose to become a direct part in hostilities.<sup>49</sup> While Koh has argued that Bin Laden has maintained "an operational role," it is predominately agreed that he did not participated directly in the hostilities at the time of his death but rather occupied a symbolic role within al Qaeda as a figurehead.<sup>50</sup>

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<sup>41</sup> Schaack, 290

<sup>42</sup> Draft Additional Protocol II submitted by the ICRC to the Diplomatic Conference leading to the adoption of the Additional Protocols, Article 25, 706

<sup>43</sup> Wallace, 375

<sup>44</sup> Ambos, 354

<sup>45</sup> Elfstrom, 18

<sup>46</sup> Vinci, Anthony. *Armed Groups and the Balance of Power: The International Relations of Terrorists, Warlords and Insurgents*. New York: Routledge, 2009. Print.

<sup>47</sup> Wallace, 369

<sup>48</sup> Wong, 131

<sup>49</sup> Wong, 147

<sup>50</sup> Schaack, 290 & 300

Finally, the ICRC, in its Interpretative Guidelines, argued that membership in an armed group should not determine the loss of civil immunities including from TK, but that a continuous combat function be proved.<sup>51</sup> The concept recognized the differences between a state's combatants and non-state 'fighters,'<sup>52</sup> specifically in terms of the latter's ability to move in and off the field at will. Bin Laden's choice of a compound not only demonstrated a fear of being found, but also, consequently isolated him from his organization and dismissed any arguments that in his role, he possessed a continuous combat function.<sup>53</sup>

IHL, while it has a broader acceptance of TK under armed conflict, places certain conditions or principles upon the actions of states and their agents. Within the ICRC Guidance, the principle of necessity dictates that "only the degree and kind of force...that is required in order to achieve the legitimate purpose of this conflict" should be used.<sup>54</sup> This is likely the least controversial principle in the case of Bin Laden, as the events of 9/11 had placed a target on his back from day one.<sup>55</sup> Arguments made in favor of an anticipatory response would later be vindicated in evidence found from the raid itself. Bin Laden had desired to conduct an attack on the anniversary of 9/11;<sup>56</sup> therefore, the principle of necessity, which would prevent potential future loss of life, was met.

The principle of distinction in Rule 1 of Customary International Humanitarian Law states clearly that "parties to the conflict must at all times distinguish between civilians and combatants."<sup>57</sup> Besides the potentially awkward conclusions that result from our argument that Bin Laden was to be considered as a civilian, and therefore, his life under article 6 ICCPR was not to be arbitrarily taken; the principle of distinction was reasonably met. Only four people killed, all with the potential exception of Bin Laden and a wife of the courier's brother, can be considered as lawful military targets.<sup>58</sup>

The last principle of IHL, proportionality, mandates that military objectives should be weighed against loss of civilian life and infrastructure.<sup>59</sup> This condition, also, was likely met by the Obama administration,

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<sup>51</sup> Elfstrom, 25

<sup>52</sup> Ambos, 348

<sup>53</sup> Schaack, 300

<sup>54</sup> ICRC guidelines, n.62, 77

<sup>55</sup> Vlastic, 327

<sup>56</sup> "Osama Bin Laden 'planned 9/11 Anniversary Train Attack'" *BBC*. BBC News, 6 May 2011. Web. 3 Mar. 2016. <<http://www.bbc.com/news/world-us-canada-13304809>>.

<sup>57</sup> Elfstrom, 23

<sup>58</sup> Schaack, 259

<sup>59</sup> Additional Protocol I, n.39, art. 51(5)(b)

as it had potentially considered a bombing of the compound but decided against it based on the collateral damage to civilians.<sup>60</sup>

## V Duty to Capture vs. Use of Lethal Force

In the aftermath of the Bin Laden raid, the US government announced that the aim of the mission had been that of capture-or-kill, which would incline towards the less lethal option.<sup>61</sup> While a potential bombing of the compound would have broken the principle of proportionality, the raid brought expectations of capture,<sup>62</sup> the question is whether the US had a duty to capture in the case of Bin Laden. Under IAC, there are no obligations to capture rather than use lethal force, only in cases of *hors de combat*;<sup>63</sup> however, the obligations under NIAC are unclear. Some scholars, such as Wong, have argued an interpretation of the ICRC Guidance that compels the US to use ‘non-lethal means’ including capture, with lethal force as a last resort.<sup>64</sup> Others have suggested that we “avoid imposing additional legal requirements that might deter similar humanitarian gestures,” such as the choice of a raid rather than a bombing of the compound.<sup>65</sup>

Considering the ambiguity of Bin Laden as a lawful military target, I would argue that the ICRC theory of least restrictive means is the most informative position. The theory would suggest that regardless of membership in a non-state armed group, the use of nonlethal measures should be used; with escalation called for only if the target is considered to be directly participating in hostilities, i.e. firing a weapon.<sup>66</sup>

## VI Conclusion

As stated previously, any conclusions that can be drawn are speculative in nature, as they depend entirely on the facts of the case at hand. IHL as the main operative body would require an expanded definition of what is considered a non-international conflict. It is likely that while this definition has yet to reach legal recognition, it has achieved some political consensus with the UNSC.

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<sup>60</sup> Gans, John A. "This Is 50-50: Behind Obama's Decision to Kill Bin Laden." *Theatlantic.com*. The Atlantic, 10 Oct. 2012. Web. 4 Mar. 2016. <<http://www.theatlantic.com/international/archive/2012/10/this-is-50-50-behind-obamas-decision-to-kill-bin-laden/263449/>>.

<sup>61</sup> Vlasic, 312

<sup>62</sup> Chiesa, 1417

<sup>63</sup> Schaack, 292

<sup>64</sup> Wong, 156

<sup>65</sup> Chiesa, 1416

<sup>66</sup> Schaack 314

With regards to the legality of the use of force, it is likely that Pakistan had given tacit consent for the Bin Laden raid; otherwise it can be argued that its approval of US drone missions established a pattern of consent. The position of Bin Laden as a lawful military objective is predicated on (1) recognizing an extended definition of NIAC, but also (2) in the case of a status-based targeting, that the non-state actor can be considered as an organized armed group or (3) in the case of an activities-based approach, that Bin Laden was a civilian who participated in a continuous combat function or directly participated in the hostilities. Neither the status-based or activities-based approaches are likely legal, as demonstrated in this paper. The US had an obligation, under ICRC Guidance, to treat the ‘civilian’ in the NIAC with non-lethal measures. The multiple shots to the chest and head were likely illegal, even under IAC obligations, as the first few would have been sufficient to label Bin Laden as a *hors de combat*.

# Forced to be Free Together: How Rousseau and Mill Became Dependent on Each Other

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Benson Cheung

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## I Introduction

If there is one thing uniting Jean-Jacques Rousseau and John Stuart Mill, it could be said it is their undying love for individual liberty. Each concerned that the society they confronted was an unjust one with a penchant to oppress freedoms, the two philosophers created very different, if not polarizing, solutions for how people can both keep their autonomy and freedoms while existing in a society. Rousseau is (in)famous for his heavily communitarian imperative (believing that a state built on a mutual social contract would be the best guarantor of people's freedoms), while Mill presented a more libertarian-leaning view supporting radical individual freedom, albeit conditional on utilitarian calculations. While Mill can rightfully argue that Rousseau's notion of freedom is incompatible with the very individual freedom he is trying to promote, I will argue here that Mill's utilitarian freedom does not hold the answers to the freedom question. Indeed, Mill's notion of freedom is so predicated on a collective end that, in the end, Mill's philosophy looks more like Rousseau's than either of them may wish to admit. As such, while Mill fares better than Rousseau on this, neither philosopher provides, on his own, a successful model for balancing between community and the individual.

## II Definitions of Freedom

Rousseau's definition of individual freedom is dependent on two things: autonomy and authenticity. For Rousseau, man, in his original condition in the state of nature, was at his most free; without language, he is required to survive alone in a harsh environment free from dependent commitments to other people, while his sense of pity for fellow human beings (which restrains him from harming others) is the goodness of human nature uncorrupted by an unnatural and sometimes deceptive reason.<sup>1</sup> While Rousseau praises the pre-political society—in which individuals balanced self-reliance with voluntary associations with others—as the most idyllic state for people to be in because it allowed for maximum autonomy and authenticity to oneself,<sup>2</sup> this state was soon wiped away with the rise of the agrarian society, which eventually enslaved everyone by making them surrender their natural liberties to their

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<sup>1</sup> Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, ed. Patrick Coleman, trans. Franklin Philip (Oxford; New York: Oxford University Press, 2009), 26–54.

<sup>2</sup> *Ibid.*, 59–62.

landowning elites and forced them to create artificial projections of themselves in order to compete in an environment governed by reason.<sup>3</sup>

Recognizing that returning to the pre-political society is impossible, Rousseau attempts to restore man's individual freedom by having people sign a social contract, placing them under a general will that aims to "defend and protect, with the whole of its joint strength, the person and property of each associate, and under which each of them, uniting himself to all, will obey himself alone, and remain as free as before."<sup>4</sup> Since all signers are now "under the supreme direction of the general will" while "each member [is] an indivisible part of the whole,"<sup>5</sup> whatever legislation they pass via the community in accordance with the general will is a product of each individual's self-legislating will—thus securing everyone's individual autonomy in an abstract sense. However, to maintain this fragile contract from being fragmented by a multitude of private interests, Rousseau requires that the general will's objective best interests be paramount; those who fail to follow it will be "forced to be free"—i.e. be compelled to follow the general will's dictates so as to preserve the freedom the polity provides.<sup>6</sup> With the general will ensuring people's autonomy and freedom to do whatever they want so long as it does not interfere with the state, Rousseau is confident that he has solved the problem of individual freedom within society.

On the opposite side, Mill's utilitarian freedom approaches the question from a pluralistic point of view. Mill's conception of individual freedom goes beyond simple autonomy; rather, he discusses individual *sovereignty*—in which an individual must be protected from being compelled by outside forces against their will, and is thereby free to think and do whatever they please insofar as they do not harm anyone else.<sup>7</sup> Thus he defines freedom as "pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their own efforts to obtain it."<sup>8</sup> Concerned that England had become too reliant on conformist and traditionalist thinking, Mill argues that this individual sovereignty must be sustained by critical thinking: the more one reconsiders their own positions, the more that individual develops themselves intellectually and becomes increasingly autonomous.<sup>9</sup> The ends of personal development are to maximize the greatest pleasure for the greatest number of people, the threshold of

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<sup>3</sup> Ibid, 63–82.

<sup>4</sup> Jean-Jacques Rousseau, "The Social Contract," in *Discourse on Political Economy and The Social Contract*, trans. Christopher Betts, Reissue edition (Oxford ; New York: Oxford Paperbacks, 2008), 54–5.

<sup>5</sup> Ibid, 55.

<sup>6</sup> Ibid, 58.

<sup>7</sup> John Stuart Mill, "On Liberty," in *On Liberty and Other Essays*, ed. John Gray (Oxford ; New York: Oxford University Press, 2008), 14.

<sup>8</sup> Ibid, 17.

<sup>9</sup> Ibid, 65–6.

which is subject to progressive increase as one cultivates their intellect toward higher goods.<sup>10</sup> To safeguard this imperative for individual sovereignty, Mill proposes that sufficiently developed societies must maintain a pluralistic environment to encourage people to think for themselves. While actions may be limited due to the Harm Principle,<sup>11</sup> censorship of ideas must never be allowed as it potentially stifles truthful ideas and calcifies mainstream notions into rote dogma<sup>12</sup>—which condemns people to mental slavery as they no longer can think for themselves. This environment allows for geniuses to rise, whose ideas can help progress humanity and thereby increase humanity’s overall pleasure.<sup>13</sup> Thus, Mill’s freedom is based on creating individual sovereignty, but the conditions for individual sovereignty also allow for and will become dependent on, individual authenticity.

As it stands, the crux of the disagreement between Rousseau and Mill rests on their respective emphasis on the focus of individual liberty, with Rousseau guaranteeing the state’s absolute power over its citizens to protect them from unjust forces, and Mill defending the idea that the community that truly supports liberty is one that encourages individual sovereignty via pluralism. Although both philosophers claim to respect and defend individual liberty, their respective systems seem at least initially to be quite incompatible with one another.

### III Mill on Rousseau

Given the apparently contradictory views of Rousseau and Mill, whose account actually gives individuals more freedom? From the previous account, it becomes apparent that something seems wrong with Rousseau’s account of freedom—is it not too communitarian for an account purported to be about securing individual freedoms? Mill would refute Rousseau’s status as an individual freedom thinker; instead, Rousseau may be seen in Millian terms as a “conformist,” whose nominal freedom of autonomy comes at too high a cost at the individual’s expense.

From Mill’s perspective, the general will is a flawed project. Mill rejects the social contractarian tradition, as he considers codifying social obligations redundant when there is already an unwritten expectation that “everyone who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the

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<sup>10</sup> John Stuart Mill, “Utilitarianism,” in *On Liberty and Other Essays*, ed. John Gray (Oxford ; New York: Oxford University Press, 2008), 139.

<sup>11</sup> Mill, “On Liberty,” 15.

<sup>12</sup> *Ibid*, 20–61.

<sup>13</sup> *Ibid*, 71–3.

rest.”<sup>14</sup> A deeper problem Mill would see in the general will is that it involves people surrendering the right to their natural liberties (i.e. whatever they can do as limited by their bodies) in exchange for getting another set of abstract freedom, “civil freedom” as “limited by the general will” and their right to property.<sup>15</sup> Yet, none of these abstract freedoms mean anything to Mill, as he believes that because “utility [is] the ultimate appeal on all ethical questions,” and “the idea of abstract right, as a thing independent of utility” is useless, and may even bring harm to society if it is used to shield people from being justly compelled to do something for the sake of the greater good.<sup>16</sup>

The general will that derives from the social contract would be severely criticized by Mill for its restrictive and dogmatic nature. Rousseau believes that the general will is objectively the best interest of the community at large, but people may be too blinded by their vested interests to see it; as such, not only should deliberations be suppressed when the community makes its decisions,<sup>17</sup> people who refuse to go along with the general will may be “forced to be free” in accordance with the community’s best interests.<sup>18</sup> The very existence of an objective, *a priori* general will would immediately raise red flags in Mill’s mind, since an objective interest is by its very nature infallible. As Mill argues, those who assume infallibility and thereby censor potentially true counterarguments usurp the “authority to decide the question for all mankind, and exclude every other person from the means of judging.”<sup>19</sup> The problem with the general will is that, even if we take for granted its truth, the “best interests” just *are*—there is no reason for Rousseau’s citizens to inquire why the general will is even their best interest to begin with. The danger of this is that it leads to lazy thinking and the loss of individual sovereignty as the population blindly accepts the general will or forces dissenters to comply. If the general will is meant to set the community free, then, to Mill, it came at the cost of enslaving people’s minds.

Furthermore, just as claiming infallibility is worrisome, Mill would likely be alarmed by the measures that Rousseau takes to ensure that the general will always prevails over particular interests, even against their will. Rousseau outright states that “anything that breaks up the unity of society is worthless” and that everyone’s attentions must be directed toward the public.<sup>20</sup> Mill would vehemently disagree with

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<sup>14</sup> Ibid, 83.

<sup>15</sup> Ibid, 59.

<sup>16</sup> Ibid, 15.

<sup>17</sup> Rousseau, “The Social Contract,” 66.

<sup>18</sup> Ibid, 58.

<sup>19</sup> Mill, “On Liberty,” 22.

<sup>20</sup> Rousseau, “The Social Contract,” 162–3.

Rousseau's denunciation of finance as one such institution dividing society, as well as enforced public life,<sup>21</sup> since this fully violates Mill's liberty prerequisite of letting people "[frame] the plan of our life to suit our own character."<sup>22</sup> Mill himself supports business as one of society's most robustly creative sectors that channels people's energies toward individual ends,<sup>23</sup> but even then, the lack of a private sphere deprives people of room to exercise their individual sovereignty, to the overall detriment of the community's progress.

This restrictive issue is markedly worse in regards to Rousseau's civil religion. Once again violating Mill's liberty principles, Rousseau believes that "it does concern the state that each citizen should have a religion which makes him cherish his duties," and atheism is explicitly a capital punishment offense (for jeopardizing the social contract's sanctity). Although Rousseau suggests it provides for freedom because "dogmas do not concern the state or its members,"<sup>24</sup> the forms in which religious creeds take shape are restricted: religions that divide citizens' attention to a religious temporal power (like Catholicism) are no good,<sup>25</sup> and all permitted religions must have enough of a spiritual metaphysics (like believing in a Creator, for instance) to make the social contract sacrosanct.<sup>26</sup> Yet, although the content may be debated freely, the fact that the state allows the existence of only certain types of religion violates Mill's infallibility principle. The state's insistence that permitted religions follow the doctrine of a sacred social contract and meet other criteria suggests that these central tenets are themselves infallible, depriving people the right to criticize these basic foundations. However, to Rousseau's credit, Mill might suggest, Rousseau's staunch opposition to any form of intolerance<sup>27</sup> may be a saving grace, as it may violate Mill's Harm Principle for potentially inciting violence.<sup>28</sup>

Even without formal state policies restricting freedoms, Rousseau had socially engineered environments where pluralism would be tacitly kept to a minimum. In his guidelines to the constitution-writing Legislator, Rousseau suggests that a society should be relatively small in population to maximize state supervision and governance over the people (while large enough to deter aggressors), relatively attentive to the demographics and customs of its people to stabilize the optimal population numbers, and relatively

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<sup>21</sup> Ibid, 126–7.

<sup>22</sup> Mill, "On Liberty," 17.

<sup>23</sup> Ibid, 77–8.

<sup>24</sup> Rousseau, "The Social Contract," 166–7.

<sup>25</sup> Ibid, 160–2.

<sup>26</sup> Ibid, 167.

<sup>27</sup> Ibid.

<sup>28</sup> Mill, "Utilitarianism," 162.

homogenous in terrain to ensure a strong social bond between people in the same environment.<sup>29</sup> Were this ever to be implemented, Rousseau's society might well be extremely stable, but having a state with the same culture, same religion, and a small and easily controllable population would without a doubt socially and environmentally predispose people toward thinking alike, and discourage them from experimenting with lifestyles contrary to their geographically-derived customs, or conducting any actions that might destabilize the population equilibrium or the community's preexisting solidarity.

This problem of limited actions extends to Rousseau's mythic ideal society. The pre-political society may seem idyllic at first for balancing autonomy and authenticity, but in practice, individuals can only practice a very limited set of actions if they wish to maintain their independence from commitments to others and be self-sufficient. After all, a pre-political individual can never progress to another stage of technology (say, building a larger hut or catching more fish) without becoming indebted to the aid of another; as such, the pre-political individual is permanently trapped by limited possibilities. Thus, both the Legislator's social engineering project and Rousseau's utopia necessitate building in restrictions in the state and social environment to discourage pluralism and maximize like-minded thinking, perhaps even at the subconscious level. The citizens would never even have had a chance to think differently because the state's structure does not and cannot provide any reference to anything different.

Thus, Mill delivers a thoroughly devastating attack on Rousseau's version of individual freedom, viewing the general will as unjustly infallible and the source of myriads of oppressive policies and conformist attitudes. Because of these controls, Mill would believe that Rousseau's freedom is incapable of uplifting people to a higher stage, and therefore, from a utilitarian point of view, Rousseau's freedom is untenable as a definition of freedom.

#### **IV Rousseau on Mill**

Conversely, Rousseau might criticize Mill's conception of freedom for its radical individual freedom at the cost of a stable society. In the first place, Rousseau may well disagree with Mill's fundamental utilitarian principle in relation to building a just society. As previously discussed, Mill believes that just as morality is built on the pleasure principle, so too is society meant to maximize human happiness through achieving perpetual progress. Yet, Rousseau would likely argue, this may be treating individual freedom as a means to an end, rather than an end itself (*The Social Contract* is written precisely to make societal institutions compatible with freedom, rather than what humanity can do with this freedom.<sup>30</sup> This

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<sup>29</sup> Rousseau, "The Social Contract," 81–5.

<sup>30</sup> Rousseau, "The Social Contract," 45.

utilitarianism is dangerous to Rousseau, in that it instrumentalists freedom, and, rather than treating it as a sacred natural right, holds it hostage to whether Mill's societal telos can be achieved or not. The social contract dynamic guarantees all its citizens their individual freedom against oppression since they themselves are part of the sovereign fabric, and they are deterred from deviating from it lest society return to the state of nature.<sup>31</sup> Yet, for Mill, while freedom of thought is a virtually sacred right, the freedom of action can be restricted if it conflicts with "the permanent interests of man as a progressive being".<sup>32</sup> Mill may have promised that peoples must be developmentally mature to receive the ability of free deliberation<sup>33</sup>—and this is something that Rousseau concurs with—Rousseau guarantees his citizens that there will never be a backslide to slavery since they would have sealed their freedom with the social contract with the help of the Legislator.<sup>34</sup> Mill can only give assurances that a mature society ought not to return to despotism.<sup>35</sup>

Without a contract to guarantee everyone's freedoms, Rousseau would argue that Mill's reliance on inviolable individual sovereignty may jeopardize the community by dividing it against itself. Mill's rejection of censorship laws pave the way for private interests to surface and cloud people's understandings of their own best interest; as such, Rousseau warns that "if the general will is to be properly ascertained...there should be no partial society within the state" or at least such should be neutered, to prevent factionalization.<sup>36</sup> Mill goes as far as to argue that because individuals are all unique in their own ways, it is impossible to find a one-size-fits-all custom that can maximize everyone's idiosyncratic pleasures, so people can simply adhere to their own customs.<sup>37</sup> But extreme individualism would jeopardize the general will's essentially impartial nature, because since every citizen surrendered their rights equally to the community and thus became equal members, they expect to be treated equally by the sovereign.<sup>38</sup> If all claim that they are unique exceptions, and that accordingly the law must respect their differences, then any social cohesion that Rousseau sought to forge would be dissolved as sovereign individuals challenge the general will to get exemptions. At the very least, all must be required to share the same basic civic virtues, since "the state must be regarded as lost" when someone starts to deem the

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<sup>31</sup> Ibid, 53.

<sup>32</sup> Mill, "On Liberty," 15.

<sup>33</sup> Ibid, 14–5.

<sup>34</sup> Rousseau, "The Social Contract," 80–1.

<sup>35</sup> Mill, "On Liberty," 15.

<sup>36</sup> Rousseau, "The Social Contract," 66–7.

<sup>37</sup> Mill, "On Liberty," 75.

<sup>38</sup> Ibid, 68.

state's affairs unimportant.<sup>39</sup> Indeed, too many individual distinctions would mean that “nothing is truly renounced by private individuals under the social contract,”<sup>40</sup> thus returning all to a state of nature and making all equally unfree.

In sum, Rousseau would also argue that Mill does not take the Harm Principle far enough. Because Mill sees the world only from an individual's point of view, he only sees the necessity in preventing people from harming other individuals, and does not quite grasp the necessity of keeping a stable society. As such, his recommendations for increased individual autonomy would actually harm everyone's interests—and, of course, this is something that Mill permits external intervention to prevent.<sup>41</sup> A more effective Harm Principle for Rousseau would entail taking all measures to prevent individuals from harming others both directly and indirectly (i.e. by doing actions that destabilize the general will's legitimacy and social cohesion). However, Rousseau would be quite pleased to see that Mill himself is intolerant of differences against the greater good, and so too also forces citizens to be free.

...Mill, the great liberal utilitarian thinker, forcing people to be free?

## **V      Forced to be Free**

Despite Mill's credentials as a utilitarian liberty proponent, in some ways his style of freedom parallels Rousseau's more restrictive version. Mill's description of the human condition forcefully states that people can and should develop progressively higher and more intellectual pleasures, deriding those who are easily satisfied by sensual pleasures as parochial, perhaps even animal-like.<sup>42</sup> In such a system, those at “the bottom” are virtually dehumanized by Mill, resulting in a pressure on people to develop higher pleasures as the only path to development. But Rousseau too believes that the necessary condition for being human is to understand that one is “free to comply or resist” nature's demands, whereas animals are condemned to feed on their natural, sensual instincts.<sup>43</sup> Despite sharing these criteria, Rousseau's humanness comes naturally while Mill's criteria must be earned over one's lifetime of self-cultivation. In this way, for Mill, man cannot be truly free—or even be fully human—unless he continually looks up to higher pleasures. Yet, for many people, this is not possible or even desired (as indicated by the fact that these people exist); furthermore, harsh life circumstances and intolerance may even force more developed

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<sup>39</sup> Rousseau, “The Social Contract,” 126.

<sup>40</sup> Ibid, 70.

<sup>41</sup> Mill, “On Liberty,” 15.

<sup>42</sup> Mill, “Utilitarianism,” 140.

<sup>43</sup> Rousseau, “The Social Contract,” 32–3.

people back to relying on carnal pleasures.<sup>44</sup> Furthermore, Mill characterizes blandly recited creeds (and by extension, inherited customs and ideologies) as lying “outside the mind, encrusting and petrifying it against all other influences addressed to the higher parts of our nature.”<sup>45</sup> If people do not use their minds, then they have essentially abdicated their freedoms of choice.<sup>46</sup> In effect, if human minds are made to be used but customs suppress their use, truly “man was born free, but everywhere he is in chains”<sup>47</sup> because people become too lazy to liberate themselves with pure thinking.

Thus, to liberate humanity from its animal-like condition, Mill must force all developed populations into a state of perpetual competition of ideas, forever keeping people’s critical thinking on alert as challengers or new ideas come to the fold. In Mill’s world, as customs crumble to individual idiosyncratic lifestyles and ideas become less sacred, everyone is forced to challenge their views, listen to others and thereby expand their intellectual capacities—in effect, this ‘marketplace of ideas’ environment forces people to be actually free as autonomous individuals. While Mill rejects the social contract tradition, he and Rousseau both believe that if society followed their ideas, their social visions could actually liberate the individual through giving them breathing space to exercise their faculties:

Although, in the civil state, he deprives himself of a number of advantages which he has by nature, the others that he acquires are so great, so greatly are his faculties exercised and improved, his ideas amplified, his feelings ennobled, and his entire soul raised so much higher, that if the abuses that occur in his new condition did not frequently reduce him to a state lower than the one he has just left, he ought constantly to bless the happy moment when he was taken from it forever, and which made of him, not a limited and stupid animal, but an intelligent being and a man.<sup>48</sup>

Yet, this environment is also tied to Mill’s notion of human progress as a collective good for all of society: since this enables the toleration that would permit geniuses to develop their ideas fully, and help effect paradigm shifts in society toward further development.<sup>49</sup> Those who are intolerant of this freed order thereby not only make themselves more like base animals by not thinking critically, but also

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<sup>44</sup> Mill, “Utilitarianism,” 141.

<sup>45</sup> Mill, “On Liberty,” 46.

<sup>46</sup> *Ibid.*, 65.

<sup>47</sup> Rousseau, “The Social Contract,” 45.

<sup>48</sup> *Ibid.*, 59.

<sup>49</sup> Mill, “On Liberty,” 71–2.

jeopardize the entire wellbeing of humanity by limiting the “atmosphere of freedom.”<sup>50</sup> As such, Mill has no tolerance for intolerant people, and the marketplace-like environment he endorses should be able to weed them out -- if there are no customs to follow and if everyone in society actively pressures others not to follow customs. Like it or not, if Mill’s system works, then the geniuses it will foster will lift all boats in society to higher ends as part of their role in a progressive historical narrative. Thus, Mill bootstraps everyone to his version of freedom.

Nevertheless, although Mill does in many ways force people to live and develop in his progressive narrative of pluralistic development, there is little doubt that in practice, Mill’s society would provide much more opportunity for individual freedom than Rousseau’s negative liberty. For instance, the very lack of censorship would mean more people can speak openly on a much more diverse variety of topics, while the lack of customary dogmas means that people can even be atheists so long as they respect the body and property of others. These, of course, are never possibilities in Rousseau’s general will. At no point does Mill physically coerce people into believing at the barrel of a gun, like Rousseau, but he always relies on civil discussion and social pressure. But if Rousseau’s social-environmental engineering would already forcibly predispose people to a certain mode of thinking and thus strip away their agency, then Mill’s environment would predispose people to only consistently think for themselves and strip away their agency to believe otherwise.

## VI Conclusion

If Mill himself parallels Rousseau’s “forced to be free” logic in the abstract sense, then what does this mean for individual freedom? Through our earlier discussions, we have shown that Mill and Rousseau can mutually identify weak points in each other’s works showing that the general will is severely restrictive while individual freedom is too atomizing. And yet, as we have shown, Mill’s utilitarianism constrains people toward one predetermined path of freedom. Despite Mill’s larger breadth for the freedom of action, it is perhaps necessary that all forms of freedom must require a fundamental coercive element that constrains people to have egalitarian freedom, or none at all. Just as the two philosophies share this basic principle, so too do they rely on one another: a secure society is worthless without individual freedom, and individual freedoms can only flourish in a secure society. With this in mind, Mill is truly right when he considers most ideas to contain only partial truths.<sup>51</sup> He too, like Rousseau, only holds part of the whole truth.

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<sup>50</sup> Ibid, 72.

<sup>51</sup> Mill, “On Liberty,” 52.





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