

# **The University of British Columbia Journal of Political Studies**

April 2008

An annual publication of the UBC Political Science Students' Association

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## FOREWORD

This scholarly journal has, on all fronts, been created by students and features intellectual work by students to be shared with students. It signifies an admirable capacity and thoughtful desire to participate in important debates about the world for which we are all responsible.

As a faculty member in the Political Science Department at UBC, I find the engagement in undergraduate education extraordinarily meaningful. I learn so much from these reflective, critical, concerned people, as will anyone who reads the essays found in this volume. I take this volume as evidence of the value of liberal arts education: these student-authors and student-editors, who are always moving out the door to trek beyond UBC into new life adventures and callings, are informed and effective analytical thinkers and communicators.

These students' willingness to take on the mantle of citizenship is not, it seems to me, informed by the narrow pleasures of intellectual elitism. Their participation is, rather, informed by a concern about the current under-representativeness of democracy, the widespread absence of justice, the presence of suffering. These students are located in a privileged and productively informed standpoint from which they have been exploring, examining, learning, shedding light, and in which they have been shocked and inspired, listening and speaking.

This journal is the end result of multiple types of creative labour. Papers have been thoughtfully drafted, pored over and polished by many authors working to find and develop their own voices amid complicated debates encountered in class, and amid complex world conditions variously read about and experienced first hand. Students on an editorial board have carefully, respectfully engaged these many papers and the learning experiences embedded therein, facing, with the help of input from faculty readers, the difficult task of drawing up a final table of contents. An artful cover was designed to invite additional readers in. Lead editors structured a decision-making process for the entire affair with an eye to student participation and a democratic ethos. Text has been checked and rechecked by human eyes so that intended meaning is understood. Timelines have been organized and followed. And all during the second term of a demanding school year!

Congratulations to all student participants – this is your work.

Sincerely,

*Dr. Laura Janara*

Department of Political Science, UBC

## Editors Introductions

This year marks the 10<sup>th</sup> anniversary of the UBC Journal of Political Studies. What an accomplishment! It is thanks to the hard work and dedication of many individuals that the publication of this journal has spanned close to a decade and what a decade it was! Countless regime changes, civil conflicts and democratic developments mark the past ten years. This change exemplifies what I consider most intriguing about political science, its constant evolution. It is neither a static science nor a single framework that can be studied. The student of political science must be well versed in history, culture, current events and politics. In this regard UBC provides an education as diverse and all encompassing as the student body it represents. The works published here are a microcosm of the intelligent and unique writings produced by the UBC community at large. We have taken a unique direction with this year's journal in attempt to really connect it to this amazing UBC community. As well as thought-provoking and illuminating writings by UBC students you will also gain a greater understanding of politics at UBC this past year. From photos of UBC activities to a photographic history of activism at UBC, this year's journal promises to more thoroughly showcase political activities at UBC.

Publishing such a journal would not have been possible without the immense contributions of many people. First let me thank the many students of UBC who so bravely volunteered their work for consideration. The number of submissions this year was overwhelming and while only a few papers could be published we appreciate each and every submission received. I would also like to thank the extremely talented authors published in this volume. Thank you for your dedication to this project. Another group of individuals whose work cannot be underestimated is our editorial board. Their willingness to work with the authors to develop their writing and ensure the best quality work possible was invaluable. They are an extremely talented group of individuals whose editing and organizational skills helped create the product you are reading today.

I would also like to thank the Political Science Students Association (PSSA) for once again being the medium through which this journal became a reality. Special thanks must go to former PSSA president Hafiz Moledina and current PSSA president Karen Riarh. Their encouraging words and steady stream of advice were indispensable. Finally, I would like to thank you, the readers, without whom this journal would not be possible. I am extremely honoured to have been involved with such an impressive project and I hope that you enjoy all the papers published herein. Sit back, relax and enjoy yourself as you meander through all of the interesting musings found in this year's journal.

Sincerely,

*Leeanne Taylor Footman*

*Co-Editor in Chief*

*UBC Journal of Political Studies 2008*

To the Reader of the 2008 Journal of Political studies,

The term ‘politics’ often evokes images of politicians and government buildings. This is largely a misconception though; politics is not restricted to any specific location, group or institution. Politics is a term that describes an activity, a mental-process, a relationship that is much more comprehensive in scope, much more pervasive and constitutive. We are embedded in structures, locations, identities that are ultimately political in nature because they deal with relations of power including class, gender, sex, race. Nothing in society is apolitical, though many issues have been depoliticized to the point that they appear neutral, objective, self-evident. The project to politicize the apolitical is, I think, of fundamental importance because as we politicize issues we become aware of problems shaped by oppression and injustice. We can’t interrogate the self-evident – the oppression remains hidden, hegemonies remain uncontested and struggles remain dormant. I would like to situate the Journal of Political studies in this context; the purpose of this Journal is not just to showcase the work of undergraduate students, it is about documenting, and therefore contributing to, the politicization of the apolitical. Perhaps a more modest aim: I hope that the content of this Journal will stimulate you intellectually but also galvanize you politically.

I’d like to thank the editorial board for working tremendously hard on this year’s journal. Leanne and I probably could have done many things differently, but we appreciate your cooperation and hope that you’ve learned something valuable throughout this process. I’d also like to thank Stef Ratjen for designing this year’s cover – it looks awesome! Moreover, I want to extend my gratitude to the PSSA for providing students the opportunity to participate in the creation of a Journal and the faculty at the political science department for participating in the editorial process. I’d like to especially thank professor Janara for her help with the Journal this year. Perhaps most importantly, thank you to the students who submitted papers. Unfortunately, we couldn’t publish all of them but we don’t want this fact to discourage anyone. There is always an arbitrary or random element in the editing process. Rest assured that all the papers we received were excellent! To those who did get published, congratulations; your papers impressed us all.

Thank you for supporting a student journal,

*O. Jasmine Ramze Rezaee*  
*Co-Editor in Chief*  
*UBC Journal of Political Studies 2008*

## EDITORIAL BOARD

**Sheena Bell**

Sheena is a fifth year Honours Political Science student who is also pursuing a minor in French. Her interests in Political Science are varied and include; quantitative analysis, Canadian politics, and contemporary political thought. During her degree, she worked in Vancouver, Victoria and Ottawa through the Arts Co-operative Education program and also participated in an exchange to the Institut des Etudes Politiques in Grenoble, France. She will begin her MA in Political Science in Montreal this September.

#### **Nathan Crompton**

“The subject is opaque to itself, not fully translucent and knowable to itself,” according to Judith Butler in her work, 'Giving an Account of Oneself.' I prescribe to this notion as a matter of convenience when confronted with the demand to write a biography. On the other hand, I do not believe in the late capitalist notion of the ever-transforming self who has no core being and who adapts to the rhythms of consumer society. We are led to believe that the existing conditions of capitalism are acceptable, and therefore our own problems are personal (i.e., biographical). I agree with the students who wrote on the walls of Oxford University: "Do not adjust your mind, there is a fault in reality."

#### **Anna Filippova**

Anna is a fourth year Honours Political Science student. She is particularly interested in international law, international relations and comparative politics. In her spare time she works as a Research Assistant for the UBC Department of Political Science. Anna plans to continue studying the world of international relations while working on her Masters Degree at one of the universities in the United Kingdom.

#### **Leeanne Footman**

Leeanne is a fourth year Political Science and International Relations Student. She is most interested in peace and conflict studies and, primarily, the rights and situation of the world's children. She is very interested in international volunteer work related to children, having volunteered for a summer in Belize. She plans to attend graduate school in the fall in the pursuit of her Master's in IR and hopes to one day work for an NGO such as UNICEF.

#### **Steven Klein**

Steven is in his final year of an Honours Political Science degree. His primary interests tend towards anything with "critical" in it: critical social theory, critical race theory, critical pedagogy, etc. He also has a more general interest in political theory, including democratic theory, civic republicanism, and the history of political thought. He hopes to continue his indoctrination at the Ph.D. level after taking time off to travel and live a "normal" life.

#### **Boris Korby**

Boris is a fifth year Political Science student. He is fascinated by American politics, but his passion is journalism, specifically sports writing. He will be pursuing a graduate degree in journalism next fall in the hopes of turning his passion into a career.

#### **Chris Malmo**

Chris is a fourth year Political Science and International Relations student. He is also very interested in the natural sciences and is wide-eyed at the prospect of a career writing for National



Geographic magazine. While not in class he divides his time between his two favourite activities, sleeping and being awake. Waking time is further subdivided into an array of fun and not-fun pursuits, with the former category greatly outweighing the latter in importance. Not long after graduation Chris wishes to cycle around France and Spain for a summer. He has truly enjoyed working on this year's journal.

#### **Nabila Pirani**

Nabila is a fourth year student, double majoring in Political Science and Asian Language & Culture. Although fascinated by the literature and culture of South Asia her main interest, and thus the focus of most of her research, is the politicization of religion and its impact on the religion. After graduating, she hopes to travel the world taking pictures, and of course, pursue graduate studies.

#### **Alesha Porisky**

Alesha is a third year undergraduate student, majoring in Economics and Political Science. Her fields of interest lie in development economics and international political economy. She is thrilled with the diversity of this year's journal and is glad that she could be a part of such an amazing production.

#### **Jasmine Ramze Rezaee**

The academic is a public servant and Jasmine wants to serve the public anti-capitalist, anti-oppression and revolutionary discourse. With this goal in mind, she's going to Toronto in September to study political theory at the graduate level.

“Change starts from within your location in society – there is always room to resist”

#### **Stefanie Ratjen**

Stefanie Ratjen is a political science student who frequently finds herself in unexpected circumstances. While the unpredictability of such situations does keep life interesting, lately it has resulted in a fair amount of sleepless nights and late assignments. She hopes for it to continue.

#### **Nadya Repin**

Nadya is a fourth year Honours Political Science student. She specializes in Canadian politics and is particularly interested in Aboriginal politics and the politics of the Arctic. She strives to protect the environment, demystify food politics, and believes that the decision to turn food into fuel is natural selection against the human race. She hopes to one day write speeches for politicians because then they would at least get the facts right, if nothing else.



**English department head Robert Jordan at student rally to protest tenure decisions for English professors Brian Mayne and David Powell, 1970**

## **Gay Civil Rights and Science: a Tug of War**

Manpreet Dhaliwal

“Gay” was first used as an adjective in the New York Times in the summer of 1987.

<sup>1</sup> It is now a common word in North America, carrying many connotations – negative and positive, factual and fictional. Its wide use is representative of the impact of the gay liberation movement and subsequent increased momentum of the gay civil rights movement beginning in the 1970s. This development embodied sexual revolution, liberation, protests for equality, opposition from political groups and, perhaps most significantly, science. Science has, in fact, been fundamental to the political development of American gay civil rights since the emergence of a visible homosexual community in the mid-twentieth century. It has enabled gays to demand rights, anti-gays to discriminate and scientists to experiment. While some were condemning homosexuality, others, particularly doctors and psychologists, were carefully studying this community to find a ‘remedy’ for their ‘problem.’ By deeming homosexuality an “illness” in medical terminology, it was easy for society and policy makers to deny the gay community civil rights under pretexts of abnormality, sickness or wrongdoing. Consequently, it was only when the medical community removed homosexuality from the list of mental illnesses that the gay civil rights

movement was finally able to take off. It thus appears science, particularly the medical community, plays a game of tug of war with the progress of gay civil rights.

However, it plays neither alone nor consistently. On the contrary, science is often joined and manipulated by politics, religion and prejudice; and while sometimes pulling against the gay rights movement, it can also play in favour of it. The AIDS epidemic of the early 1980s demonstrates this game of tug of war in which science and the gay civil rights movement are pushed and pulled by one another, by factions within their teams and by other players.

Yet, although science shapes the gay civil rights movement through language of medical discourse and scientific publication, these factors are subject to manipulation by funding, secrecy, patents, politicians, biases, aspirations, religion, naivety, attempted neutrality and misinterpretation. This paper briefly examines how medical science aided the gay civil rights movement in the decade preceding the AIDS outbreak in the United States and then analyses its detrimental role during the outbreak in the 1980s. The AIDS epidemic thus highlights the impact of science in the gay civil rights movement in its ability to both further and hinder the movement.

### **America in the 1970s: Science Creates Legal Grounds for Gay Civil Rights**

Throughout the course of the 1950s and 60s, the gay community was not demanding civil rights but that their voice be heard. They worked to break the perception of homosexuality as “dangerous, deviant and wrong” by publishing counter materials and establishing allies among professionals in law, government, medicine and the church.<sup>2</sup> “The fighting spirit of gay liberation,” John D’Emilio contends, was born in the 1969 Stonewall Riots when “the queens fought back in Greenwich Village.”<sup>3</sup> David Carter’s *The Riots That Sparked the Gay Revolution* describes the gay community’s protest against frequent police raids in their night clubs and bars. The riots both curtailed police harassment and represented a symbolic victory for the movement.<sup>4</sup>

The first legal victory presented itself as a change in medical terminology in the 1973 Disabilities Act. The removal of homosexuality from the American Psychological Association’s (APA) Diagnostic and Statistical Manual of Mental Disorders (DSM-II) meant it was no longer an illness, thus fostering a legal climate in which the community could demand equal rights. Subsequently, sodomy laws were repealed in several states, civil rights protection adopted in others and discriminatory policies, such as the 1978 California Briggs Initiative, designed to ban homosexual teachers and advocacy in schools, failed to pass.<sup>5</sup> Where Stonewall had instigated liberation, the change in medical discourse enabled the civil rights movement to truly take off. The gay community no longer merely wanted to be heard but was saying, “Get out of our bedroom and out of our psyches” and, “Put a stop to our mistreatment.”<sup>6</sup> D’Emilio describes the ensuing attitude of the 1980s as, “Here we are.” Yet in this attitude lay an uncertainty in the security of both their collectivity and their place in society.<sup>7</sup>

On the other hand, the late 1970s developments of bathhouses and sex clubs in San Francisco and New York created safe and comfortable spaces for gay men to unite and to free themselves from years of repression. These spaces were symbols of gay liberation and gay rights. Although some, such as equal rights advocate Bill Kraus, had trouble reconciling this new “sexual Disneyland” with their political aspirations for the movement, they nonetheless fought for it because “it had taken a decade to build this sexual freedom in San Francisco, and they couldn’t give an inch or else it all might be taken away.”<sup>8</sup> At the same time Kraus realized, “politically, however, the dehumanisation of sex was troublesome.”<sup>9</sup>

Medically, problems with bathhouses became notable; being gay became a health hazard since infections and parasitic diseases were easily and rapidly spread through anal sex.<sup>10</sup> Nonetheless, most doctors refrained from advising patients of safer methods as they felt either uncomfortable addressing the subject of anal sex or felt the patients would not listen. Some doctors did, in fact, advise their patients only to quickly realize they indeed did not take their warnings seriously.<sup>11</sup> Dr. Selma Dritz, however, was not hesitant in telling members of the gay community of the consequences and processes of sexually transmitted diseases and infections: she had no qualms with the necessary vocabulary of ‘anal sex’ or ‘oral-anal’ contact. As a result, in her San Francisco clinic she became the ‘den mother of the gays’ as she spent much of the 1970s meeting and discussing with gay patients and gay doctors. She further tried to

teach medical students of the need to caution patients of the dangers of too much being transmitted and going unchecked, saying, “If something new gets loose here, we’re going to have hell to pay.”<sup>12</sup>

### **Science Cannot Change All: Remaining Discrimination Against Gays**

Despite the APA’s declassification of homosexuality in 1973, sexual reorientation therapies persisted. Regardless of no longer being deemed a medical disorder, medical professionals continued to attempt aversive and prescriptive treatments (including shock therapy, pharmaceutical remedies, surgery and chemical intervention among others) to “cure” homosexuality. Societal and medical stigmatisation of the gay community thus persisted as neurologists, psychologists and physicians continued in their attempts to “extinguish homosexual interests”.<sup>13</sup>

Discrimination was reinforced by antiquated but remaining legal institutions, such as laws barring homosexuals from “setting foot in [the US] on the ground that they were ‘pathological’ under a law passed during the McCarthy era.”<sup>14</sup> Even further, the 1977 decision of the California Court to sentence the murder of a gay man with only five years of jail time signified the difficulty of changing political institutions. This lenient sentencing of the man who assassinated Harvey Milk, the first openly gay man elected to the San Francisco Board of Supervisors and a symbol of progress for the movement, demonstrated the inability of the 1973 Disabilities Act to change the legal precedent for hate crimes. Further, a large divide remained between condoning homosexuality but condemning *acts* of homosexuality. This is represented by Reverend William Sloane Coffin of New York who said, “Being gay is not a sin” but retained the view that the sexual acts of gay men were sinful.<sup>15</sup> Thus, although homosexuality was no longer deemed a disease and sodomy laws were repealed in several states, much of society’s bias did not preclude homosexual acts from moral censure or judgement.

At this point, it was clear who was opposite gay civil rights in the tug of war: specific figures such as Anita Bryant, a famous southern Baptist singer who campaigned to prevent equality of gay persons; republican politicians who rallied the religious south against gays in order to further their votes; religious fundamentalists, such as Jerry Falwell and his Moral Majority who pressed to repeal homosexual rights laws in a dozen cities in the late 1970s; and anti-gay schoolteachers, such as John Briggs. Where anti-gay activists were relying on morality and religious judgements to inhibit the gay rights movement, science was giving greater clout to gay persons by affirming they were ‘normal’ and by silently and cooperatively fighting their diseases and infections from the bathhouses. Yet despite this progress and its disassociation with mental disorder, homosexuality became equated with illness once again in the 1980s with the outbreak and ‘discovery’ of AIDS.

### **1980: The Election Year of a Republican President in the Year before AIDS**

Many felt Republican Ronald Reagan’s presidential victory - a year before the first reported cases of AIDS - was fatal to the gay civil rights movement. The increase of gay men involved in politics (particularly the dramatic rise in San Francisco’s democratic caucus from four gay men in 1976 to 76 in 1980), although a success in terms of gaining a voice in the democratic platform, proved as lethal as it was successful. The Democrats’ new gay rights agenda was vehemently contested by anti-gay Republicans. For instance, television ads aired by southern Republicans showed photos of deviant-looking gay marchers with the commentary, “The gays in San Francisco elected a mayor,” followed by a photo of the Democrat’s presidential candidate Jimmy Carter: “Now they’re going to elect a president.” The religiously fundamentalist Moral Majority, a political force in the south, furthered such anti-gay sentiment by linking the growing power of homosexuals to the Last days in the Bible with citations from the book of Revelation.<sup>16</sup> Reagan’s 1980 victory was thus a setback to the gay civil rights movement which had been going forth with powerful momentum since 1973.

This republican victory was mitigated, however, by the existence of “safe urban enclaves” (New York and San Francisco) where gays would be guaranteed the most basic civil rights on a state-regulated level. Bill Kraus found further consolation in that “the gay cause was essentially a battle for social legitimacy, not any specific spending programs.”<sup>17</sup> In other words state-laws would guarantee gay men their basic rights and freedoms and federal law could not take these away from them.

### 1981: A New Disease and Contending Views

When the first cases of AIDS appeared in 1981, however, gays were no longer protected by such enclaves, nor by state-laws which were unable to provide necessary funding for research and treatment. The disease first presented itself in five gay men as Kaposi's Sarcoma (KS) to physicians and as "an unusual disease in gay men" to epidemiologists such as Dr. Don Francis, former Director of AIDS Laboratory Activities at the Centre for Disease Control (CDC).<sup>18</sup> The media's story thus became one of a 'gay cancer' or 'gay plague'.<sup>19</sup> Gay rights advocate Bill Kraus felt such reports of KS were due to anti-gay bias in the press: "let a few people get sick and they get all over it."<sup>20</sup> Thus, the medical discourse surrounding this new disease, "spoken or written utterances occurring in a particular context and directed, however vaguely, at a particular audience," was highly influential in how it was perceived and responded to by politicians, gay men, doctors and medical researchers.<sup>21</sup>

Dr. Jim Curran of CDC reports, "Some investigators who were seeing cases in gay men chose to call the syndrome gay-related immune deficiency, or GRID."<sup>22</sup> This name was later phased out by epidemiologists as there were no epidemics known to target a single community. Shaping this new illness as a non-gay disease would prove difficult however, as it first struck in San Francisco and New York City, "the homes of the most visible and vocal gay populations."<sup>23</sup>

The official name Acute Immunodeficiency Disorder Syndrome (AIDS) came in 1982, but the progress of separating homosexuality from illness since 1973 had already been erased by both the medical community and the media. AIDS had already become a metaphor for gay; homosexuality was once again a disease - "what used to be a psychiatric pathology [had become] an infectious one".<sup>24</sup> By 1982, Michael Lynch felt, "Gays [we]re once again allowing the medical profession to define, restrict, pathologise [them]."<sup>25</sup> He adds:

Another crisis exists with the medical one. It has gone largely unexamined, even by the gay press. Like helpless mice we have peremptorily, almost inexplicably, relinquished the one power we so long fought for in constructing our modern gay community: the power to determine our own identity. And to whom have we relinquished it? The very authority we wrested it from in a struggle that occupied us for more than a hundred years: the medical profession.<sup>26</sup>

From articles titled "AIDS Strikes Gay Men" being published in 1981 to others titled "AIDS as God's Punishment" in 1987 – the impact of how the disease was first portrayed remained despite widespread knowledge of heterosexual victims and transmission well throughout the 1980s. Check and Fettner emphasize the detriment of equating AIDS with gay men in their 1985 publication *The Truth About Aids*. They highlight instances where older physicians are reluctant to accept AIDS thinking of it only as a 'gay' or 'Haitian' disease rather than a disease that affects these groups. When seeing the disease in non-gays or non-Haitians, Dr. Margaret Fischl describes, "Some simply cannot relate to it; it just isn't what they're likely to see."<sup>27</sup>

The limited viewpoints and perceived targets were harmful for research as well. Paula A. Treichler comments:

The possibility that AIDS was 'merely' some unanticipated side-effect of gay male sexual practices...limited its appeal to basic scientists. But with the discovery that the agent associated with AIDS appeared to be a virus - indeed, a *novel retrovirus* - what had seemed predominantly a public health phenomenon (clinical and service oriented) suddenly could be rewritten in terms of high theory and high science. The performance moved from off-off Broadway to the heart of the theater district and the price of the tickets went way up.<sup>28</sup>

In other words, scientists are continually “going for the gold.”<sup>29</sup> In the case of AIDS, ‘gold’ meant credit for discovering the virus along with patent rights in any AIDS test and a share of the royalties if that test were developed – perhaps even a Nobel Peace Prize. Consequently, American researcher Dr. Robert Gallo publicly claimed he had discovered the virus in 1984, calling it human T-lymphotropic virus (HTLV – III), in relation to his HTLV cancer viruses. A few days earlier, Dr. Luc Montagnier from France’s Pasteur Institute also claimed to have found the virus, which he named lymphadenopathy-associated virus (LAV) after finding it in the lymph node of a patient.<sup>30</sup> The 1984 announcement of Gallo’s sole discovery of HTLV – III thus aroused much tension with Montagnier’s group who had both found it prior and argued Gallo’s group had found the virus in a culture sample sent from the Pasteur Institute. The controversy was not put to rest until 1987 when equal credit was given to both parties and the virus was named human immunodeficiency virus (HIV).<sup>31</sup> John Langone, medical and science journalist, emphasizes that disputes such as these “spawned more tension, mistrust, charges and counter-charges among researchers than normally occur” – in turn, putting a crimp on AIDS research.<sup>32</sup>

Even more often, scientists were reluctant to share information. In one instance in 1981, a scientist reported all his findings on the virus causing AIDS only to be criticized for his openness by fellow scientists who argued he should have withheld the information until after a medical journal’s publication as it could now be used without credit. Although his response was, “What are you talking about? This is an epidemic!” the information was subsequently used in an editorial without credit.<sup>33</sup> This presented a cyclical funding dilemma: if scientists do not publish and receive recognition, they have more difficulty gaining access to research grants and opportunities and thus cannot make discoveries to publish. In turn, the need to for secrecy becomes vital. However, secrecy meant lack of collaboration and consensus which produced a multiplicity of scientific views. These views began competing for recognition in any form possible throughout the AIDS crisis, sometimes in reputable science journals and other times through popular media and science magazines. This cycle not only hindered AIDS research but confused the public. If the scientific community could not achieve consensus, how could the average person understand this new disease? The various scientific views not only spread misinformation regarding transmission and target groups, particularly with regards to gay men, but were also manipulated to the detriment of the gay civil rights movement.

Even seemingly concrete, non-controversial facts such as the role of HIV were contentious issues. Peter Duesberg, a former professor of molecular and cell biology at the University of California at Berkeley, “a brilliant virologist,” recipient of an award for outstanding investigative research from the National Institutes of Health (NIH) and discoverer of the first cancer-related gene in 1970, aroused such contention. Duesberg’s two main arguments were that AIDS is not caused by HIV and AIDS cannot be understood as one disease. He insisted AIDS must have different causes depending on which group of people have it, such as hemophiliacs or homosexual men. Despite being vehemently and accurately refuted by the majority of the scientific community, Duesberg’s research nonetheless made its impact in the media outlets.<sup>34</sup> His controversial theories were published in two of his own books as late as 1995 and 1996 as well influential journals such as the *American Journal of Continuing Education in Nursing* in the 1980s.<sup>35</sup> Such publications allowed scientific facts regarding the causes of AIDS to be manipulated or discredited in the early and mid 1980s, enabling some to blame the actions of gay men for the spread of the disease and feel falsely immune. Confusion spread among the masses, already having difficulty understanding causes and ‘targets’ of the epidemic, causing many to rely only on what was visible in the forefront – that AIDS was mainly affecting the gay community. At least all scientists and media outlets could agree on that.<sup>36</sup>

The media’s presentation of scientific discourse was further hindered by rules of publication rights. ‘The embargo’ was one such impediment, whereby some medical journals were delivered to major media outlets two days prior their actual release so up-to-date stories could be published for the day of release. This meant, however, journalists were unable to obtain contesting, supporting or even evaluative medical opinions on the material as it had not yet been released to the medical community by time of publication.<sup>37</sup> In addition, Rom highlights that journalists often lack a science background, making accurate reporting on scientific topics challenging. Rom comments on one journalist who took the time to

learn the science around AIDS and was rewarded by sources (who appreciated the extra effort) but at the same time had immense difficulty in keeping current on AIDS research along with all of her other duties. Misinterpretation was easily overlooked as editors may also have been lacking the ability to judge scientific accuracy and quality of AIDS stories.<sup>38</sup>

Gaps of scientific consensus and media understanding thus produced inaccurate, often bogus, articles. This is seen in a publication in the May 1983 *Journal of the American Medical Association* in which Dr. James Oleske suggests AIDS can be transmitted by 'routine household contact'. The National Institute of Health's (NIH) Dr. Anthony Fauci corroborates this belief in an editorial in the same issue.<sup>39</sup> As Edward Alberts argues, fallacies and dissenting views such as those of Dr. Duesberg's resulted in a media that 'medicalised' deviance, meaning they redefined the offending behaviour or condition from one of 'crime' or 'sin' to one of 'illness'.<sup>40</sup>

### **A Homophobic Administration?**

Gay persons with AIDS (PWAs) were also searching for the virus causing AIDS in the early stages of the crisis. The desperation to discover the virus increased alongside death rates and as the media and society constructed a story in which the gay community was blamed for the disease. Before Gallo's 1984 announcement of the HTLV-III virus, Charles Ortleb, publisher of *The Native*, a gay newspaper with high credentials, was determined to find the virus causing all his friends to die. On a whim in late 1981, he assigned an employee to pursue Jane Teas's African swine fever (ASFV) hypothesis published in a prestigious British medical journal, the *Lancet*. In "Could AIDS Agent Be a New Variant of ASFV?," Teas, a Ph.D. in pathology but by no means an AIDS specialist or physician, links a virus found in African pigs to AIDS. She argues the two are linked because of their similar effects of devastating the immune system through attack of the same cells. Teas claimed the agent had transferred from pig's blood to humans through uncooked pork that came in contact with human blood, such as through a tear in the gums, stomach lining or digestive tract. In addition, ASFV had plagued Caribbean pigs for years and AIDS had been traced to Haiti by this point.

Although there were no other links or support for this theory, Ortleb felt that evidence of such links would soon follow and began publishing small stories on ASFV. He was further convinced by old newspaper articles claiming the CIA had planned to weaken the Cuban economy by infecting the pig population with ASFV in 1971. When the government pulled Teas's funding and still had not found the cause of AIDS by early 1984, Ortleb was convinced Teas was right and the government simply feared letting the story out.

The Reagan administration's federal health budget cuts thus not only exacerbated the funding dilemma but the development of bogus theories and conspiracies. One physician whose grant proposals were constantly turned down says, "I was very aware that the refusal was homophobic." Those who believed such allegations felt even more so upon the appointment of Dr. Edward Brandt, a conservative Baptist schoolteacher, as Assistant Secretary of Health and Dr. James Mason, a Mormon and staunch republican, as the new CDC Director. Both men's religions and political beliefs condemned homosexuality, making conspiracy theories of the administration more plausible and popular.<sup>41</sup> Dr. James Curran, Coordinator for the CDC Task Force on Kaposi's Sarcoma and Opportunistic Infections from 1981 to 1982, recalls:

One of the most difficult things for us at the CDC was feeling like the communities that were at greatest increased risk didn't trust us because we worked for an administration which wouldn't mention the word "AIDS." We worked for an administration which had some anti-homosexual agendas.<sup>42</sup>

Check and Fettner highlight the gay community's mistrust in the administration, contending:

Many gay men seriously believe that AIDS is part of a plot against them, a biologically engineered bomb set loose to reduce their ranks.<sup>43</sup>

A gay physician in New York supported such notions, “Can you imagine anything this straight, white, conservative cold administration would rather see than all gay men being wiped from the face of the earth?”<sup>44</sup> These views were echoed by Dr. Allan L. Goldstein, a leading researcher in Washington who felt, “There are individuals in the health-political arena that couldn’t care less about what happens to people in the gay community.” As “perverts” and “sinners”, in other words, “they are getting what they deserve.”<sup>45</sup> Thus, the perception of AIDS neglect due to an anti-gay administration was not solely held by the gay community but by members of the medical community as well.

Others took into account the administration’s ignorance and refusal to acknowledge the gravity of AIDS: “Our president doesn’t seem to know AIDS exists,” Marc Feldman said, “He is spending more money on the paints to put the American flag on his nuclear missiles than on spending on AIDS.”<sup>46</sup> Some progress was made, however, when Dr. Brandt labelled AIDS as the nation’s “No. 1 health priority” in May of 1983.<sup>47</sup> Dr. Brandt, aware of having to support Reagan, but also aware of the dangers of ignoring AIDS made a public move that would force the administration to put its money where its mouth was. With this news hitting the front pages of every major newspaper, the House subsequently approved a \$41 million budget for AIDS that September.<sup>48</sup> Dr. Mason further countered notions of a homophobic administration in 1984 by giving Ortleb the “inside scoop” on the discovery of the virus causing AIDS before the press release. This move not only preserved *The Native’s* reputation by sparing it the embarrassment of publishing ASFV as the virus causing AIDS but also showed the willingness of medical professionals within the administration to cooperate with the gay community on matters of science and health in the face of an epidemic.<sup>49</sup>

Nevertheless, the consequence of Reagan’s delayed recognition of AIDS caused a delayed response from pharmaceutical companies such as Merck, which only began research for vaccine and treatment in 1983 upon becoming aware of the crisis.<sup>50</sup> As a result of lagging research and lacking funds, treatments were slow to come and gay men were dying in high numbers. The first effective treatment, azidovudine (AZT), emerged in 1986 and was, in fact, a previously patented drug for cancer treatment. It had originally been developed in the 1960s with public money and patented by the pharmaceutical company Burroughs Wellcome. Dr. Margaret Fischl’s 1985 trials with HIV patients showed AZT worked against the replication of HIV viruses – effectiveness was, however, limited due to HIV’s ability to build resistance.<sup>51</sup> To avoid the lengthy process of FDA approval, however, AIDS organisations such as AIDS Coalition to Unleash Power (ACT UP) led by gay activist Larry Kramer fought for ‘compassionate licensing’ or access to the drug for those who had nothing to lose.

Partially as a result of the changes in federal spending in health, relationships between corporations and science were also changing; biotechnology firms as well as pharmaceutical companies were fostering university-business relationships to increase research and development.<sup>52</sup> Scientists within this sphere of business offered journalists much of the information regarding AIDS. What journalists rarely considered, however, were the business interests of scientists who were now working for firms with shareholders rather than solely for the public. Scientists were now responsible to a clientele wanting tangible results, meaning their publicity would affect the corporate world.<sup>53</sup> Although established chemical companies adopted recombinant DNA (rDNA) technology needed for vaccine research in AIDS, they did not promote the research as much as small entrepreneurial companies. Thus, the new biotech industry of freestanding enterprises and the scientists working under it were looking for funds, which often meant neglecting certain groups, making grand promises or releasing uncertain but momentous press releases in order to boost profit rather than health benefits.<sup>54</sup> The perception of AIDS as a ‘gay disease’ was thus an impediment to the furthering of scientific research in many areas where shareholders held homophobic views. On the other hand, development of AIDS treatment and research was most active in the vicinities of or in proximal relation to San Francisco and New York where the gay civil rights movement had support, power and money.



### The Media, Scientific Discourse and the 4H's

One scientific 'fact' that was not misconstrued by the media was the high risk group statistics presented by the CDC in June 1983. This included homosexuals (71%); drug users/heroin addicts (17%); people from Haiti but now in the US (5%); haemophiliacs (1%); and a category of 'other' making up the remaining 6%.<sup>55</sup> Within the creation of this fact, however, was bias due to limitation of sources and resources as well as method of presentation. To begin with, cuts made to CDC funding in May of 1983 disabled epidemiologists from investigating the increased scope of AIDS cases among non-promiscuous, non drug-using, and non-homosexual victims due to a lack of staff.<sup>56</sup> The hope of media attention to raise awareness proved futile due to the CDC's published statistics. Many newspaper outlets felt American families did not want to read about a disease that only affected gay men and other minorities.<sup>57</sup> The method of the CDC's presentation, although accurate in numbers, was grossly misleading in its language. Firstly, the homosexual group included both heroin users who were homosexual (10%) as well as bisexuals and, second, rather than listing Haitians under a 'heterosexual' category, they were divided racially. The portrayal of the high-risk groups, known as the 4 H's, created mass misperception that AIDS was restricted to a type of person (excluding heterosexuals), rather than through a process. This was in spite of the scientific community's knowledge by this time that AIDS could be transmitted through vaginal intercourse.<sup>58</sup> Thus, "the 'gay' nature of AIDS was in part an artifact of the way in which data were collected and reported,"<sup>59</sup> and the ensuing construction of AIDS resulted in stigmatization of gay men.<sup>60</sup>

In late 1983, however, newspapers reported two heterosexual women had contracted HIV through contact with infected males.<sup>61</sup> *Life Magazine's* 1985 cover story reads, "No One is Safe from AIDS", thus making the disease a heterosexual concern, but also causing disproportional panic.<sup>62</sup> By December 1986, although the scientific facts had not changed, the disease was finally portrayed as something "you" could get, including heterosexuals.<sup>63</sup>

Yet dissenting views still existed beyond 1986. Jonathan Langone asserts in his 1988 publication of *AIDS: The Facts* that AIDS does not pose a risk for heterosexual persons. The worst fear that AIDS could happen to "us" and not only to "them", according to Langone, had not come true. He acknowledged counterarguments and even described cases where women had sex with HIV-positive men and were subsequently diagnosed. He contended these women more likely contracted the disease in other ways because "vaginal sex is not now, and may never be, high among" the behaviours conducive to contracting AIDS.<sup>64</sup> In a 1985 article titled "AIDS: The Latest Scientific Facts" published in the popular science journal *Discover*, Langone claims the virus enters the bloodstream through the "vulnerable anus". Conversely, the "rugged vagina" is too tough of a barrier for the AIDS virus to penetrate.<sup>65</sup> Again, this made it appear that only homosexual men were vulnerable to AIDS, placing them in a separate category from the rest of society.

Jeffrey Weeks contends it is not homosexuality which troubled the public but the equalisation of homosexuality with heterosexuality.<sup>66</sup> This perhaps accounts for the refusal to accept that both vaginal and anal sex are conducive to the transmission of the HIV virus. Dr. Jim Curran of the CDC recalls:

There was an enormous amount of denial, however, and skepticism about this, because America, and perhaps all of us, did not want this to be heterosexually transmitted. We didn't want to hear that it could affect all of us. We wanted to be able to compartmentalize it and say, "Thank God we're not gay men," or "Thank God we're not drug users." But the implication of heterosexual transmission, of transmission to newborns, was a much broader one that said this epidemic had implications well beyond the initial groups.<sup>67</sup>

This perhaps accounts for Langone's insistence that "heterosexuals are not, per se, members of yet another high-risk group for AIDS." Langone further argued that gay advocates were "eager to take the onus off their community" and for this reason falsely claimed the disease could be transmitted through heterosexual relations. He assured the public, however:

That if a person does not belong to one of the known risk groups, he or she has very little to fear from the disease, for it is not lurking in every straight singles bar; indeed, the chance of picking up the virus in such a place is about the same as the chance of winning the jackpot in the state lottery.<sup>68</sup>

This is not meant to be a criticism of sexual preference, according to Langone, but recognition that “homosexuality and AIDS are synonymous” because of the forms of behaviour gay men engage in. Thus, according to Langone, the ‘de-gaying’ of AIDS (i.e.: claiming AIDS is a danger to heterosexuals) was simply a method to make the virus appear a “public menace” in order to gain funding from Washington.<sup>69</sup> His main message is this: AIDS is “nowhere near the ‘heterosexual threat’ that some have made it out to be” and AIDS will continue to hit on hardest risk groups it currently afflicts – “homosexuals who engage in anal sex and drug users”. This affirms Janet Baker’s 1982 finding of “overwhelming evidence that the present health crisis of AIDS is a direct result of excessive promiscuity”, where ‘excessive promiscuity’ (as defined by the National Cancer Institute) is approximately 1162 partners in one lifetime.<sup>70</sup> By counteracting scientific fact, such views also offset the gay civil rights movement by stigmatising gay communities.

### **The Detriment of De-sexualizing AIDS in the 1984 Bathhouse Controversy**

The ‘de-gaying’ of AIDS, although a tactic for gaining funding and attention, was also meant to break the fallacy of heterosexual immunity to prevent its spread. This ‘de-gaying’, as Rimmerman calls it, nevertheless deflated the gay civil rights movement. “De-gaying” AIDS meant that issues crucial to the movement, such as discrimination, had to be sidelined as funding and AIDS rights became the focus. Simultaneously, emphasis on everyone’s vulnerability to AIDS played down its threat to gay men. Rimmerman argues this, which made gay men feel equally susceptible to the disease as heterosexuals when they were, in fact, at higher risk – not because of who they were, but as a combined result of their behaviours and the high numbers who were already infected.<sup>71</sup>

Regardless of the obvious health risks posed by bathhouses, their 1984 closures were highly controversial because of what they symbolised to the gay civil rights movement. Scientific fact and medical dangers were pulling against a symbol of gay civil rights, but literally for the survival of the gay community. Roger Enlow describes medical professionals’ fears of pushing ‘rights’ boundaries when considering banning voluntary blood donations made by gay men before the mode of transmission was clearly known. This concern, however, was pushed aside as many felt it would “imply *their* blood was ‘bad’ and was causing AIDS.” The medical community was very aware of the potential their personal actions and counsels had in impinging upon gay civil rights.<sup>72</sup> The controversial issue of the bathhouses thus drew support and opposition from within both the medical and the gay communities.

The baths were “multi-million dollar sex houses” drawing in approximately half a million customers annually in San Francisco.<sup>73</sup> Patrons were not only gay men revelling in their new liberation but also ‘straight men’ from the suburbs who were married with children but occasionally participated in ‘anonymous sex’ at the ‘tubs’.<sup>74</sup> The danger lying in these bathhouses, or as Randy Shilts called them, “dens for publicly licensed murder,” was recognized by most but acknowledged by few.<sup>75</sup>

Although physicians saw the health consequences of sexual engagement with multiple partners at the bathhouses prior to the outbreak of AIDS, they had difficulty in communicating this for two reasons. First, when warnings were issued, they were largely ignored. And second, many thought suggesting an alternative to the “liberated gay life-style” would be “judgemental” or an “affront” to the gay rights movement. In other words, many doctors felt it was a gay man’s right to conduct himself as he wished, regardless of the health consequences.<sup>76</sup>

Data collected by Psychologists Dr. Leon McKusick, Dr. William R. Horstman and Dr. Thomas Coates in 1983 evaluated changing sexual behaviours of a random sample of 700 men throughout the early stages of the crisis in San Francisco. The data was broken into three groups: a bar group, bathhouse patrons and married men. The results showed all three sectors had the same awareness of the AIDS

problem and how to avoid contracting it but bathhouse patrons were the least likely to follow safe sex guidelines. Of these, 68% said they used “anonymous sex as a way of relieving tension” with 62% saying, “Sometimes I get so frustrated that I have sex I know I shouldn’t be having.” Even worse, 8% had reported enlarged lymph nodes, meaning 1 in 12 patrons was likely already infected with HIV.<sup>77</sup> In this, the media was “only too happy to promote the view that AIDS is caused by deviant lifestyles rather than an infectious agent”.<sup>78</sup>

As a result of such intentional ignorance, Bill Kraus “believed every one of [the bathhouses] should be shut down” as bathhouse owners “d[id]n’t care that they might be killing people” and were only after profits.” Larry Littlejohn, also a veteran gay rights activist, hoped for a ballot initiative to allow the mainstream gay community to decide democratically on closure so it would both employ and respect their civil rights. Others, including gay businesspeople, doctors, and politicians supported Kraus and urged San Francisco's Director of the Department of Public Health, Dr. Merv Silverman, to simply order the bathhouses closed.

The director's first move was to ban high-risk sex at the bathhouses and sex clubs as an emergency measure and to arrange for inspectors from the health department to enforce these new measures. The idea was to ensure “dangerous sex” was not occurring at the bathhouses and only close the facilities not conforming to new regulations. In spite of emergency measures, upon investigation it was evident little had changed and all bathhouses were subsequently shut down.

Activist Cleve Jones spoke for those who felt these closures impinged on their civil rights and liberation: “It goes back to the reality of the lives that we were living as incredibly sexually repressed people.” He continues, “I still believe that it is the behavior that spreads the disease, not the location where you're engaging in the behaviour.”<sup>79</sup> Thus, after Silverman's order, the 14 bathhouses successfully sued to reopen with only the minor revision that they hire monitors to expel anyone engaging in high-risk sexual activity.<sup>80</sup> Despite this courtroom success, in the context of the dangers of promiscuity and specific ‘behaviours’, the 1986 US Supreme Court ruling in *Bowers v. Hardwick* upheld the state of Georgia's law forbidding oral and anal sex. This indicated the constitutional right to privacy did not extend to homosexual relations, a loss for the gay civil rights movement.

In this way, homosexuality was seen as a ‘social epidemic,’ with the scientific facts of AIDS serving to reinforce this view. These perceptions were “releasing a persistent and powerful metaphor – homosexuality as contagion.”<sup>81</sup> Beliefs that homosexuality was contagious or taught to children through recruitment were exacerbated by the ‘discovery’ of the HIV virus, upon which many deemed the ‘transmission of the contagion to even the most ‘innocent’ and uncontaminated parties. Such anti-gay beliefs that were latent in the years before AIDS surfaced with full force in the years following the ‘discovery’ of the HIV virus as a result of misrepresentation and manipulation of scientific evidence.<sup>82</sup>

### **AIDS Education and Fighting Back**

Lack of sexual education and awareness campaigns only exacerbated such inaccurate views. In fact, many conservatives did not want to advise safe sex to gays because they feared this would condone and encourage their behaviours and lifestyle.<sup>83</sup> Yet despite these views, conservative and Christian Surgeon General C. Everett Koop urged parents and schools to have a “frank and open conversation” about AIDS with children and teenagers” in his 1986 report. By the late 1980s, the health officials within the conservative administration finally recognized the dangers of AIDS and its potential impact on the country (for both homosexual and heterosexual persons) as well as the world's population.<sup>84</sup> Nevertheless, Senator Jesse Helms inserted an amendment in the AIDS funding bill of 1987 prohibiting the CDC from funding any activities that “promote or encourage, directly or indirectly, homosexual sexual activities.”<sup>85</sup> In other words, his amendment prohibited sexual education for prevention of disease both legally and nationally because it would ‘promote homosexuality’. In the process of doing so,

Helms and his allies skilfully used AIDS prevention activities to paint homosexuals in the light that made the straight public most uneasy, making it difficult for health-minded members of Congress to support prevention.<sup>86</sup>

Conservatives such as Helms abused science not simply to deny education but to stigmatize the gay community to the detriment of both the gay civil rights movement and the health of the nation.

Subsequent to Helms's amendment, however, the Gay Men's Health Crisis (GMHC), an organisation formed in 1981 to respond to the AIDS crisis, successfully sued the government to have the amendment removed. GMHC was playing the game of tug of war, pulling back the rights it had already been given not solely for the gay community but for the entire population.

The way the US dealt with AIDS had profound international implications both for the gay civil rights movement and the scope of the disease. Francis Mondimore argues, "The epidemic mobilized gay and lesbian communities as nothing had before."<sup>87</sup> Where in the decade preceding the AIDS crisis many were reluctant to leave the safety of 'gay ghettos' and advocate or fundraise for their rights, now they were coming out wearing t-shirts saying 'silence = death' to gain attention for the cause of AIDS.<sup>88</sup> This by no means equates the gay civil rights movement with AIDS movements; however, it does show a relationship of increased solidarity and a rise in civic/political skills necessary to lobby a government for their rights in the future. Although policymakers and other institutions were initially reluctant to open their doors to AIDS activists, once this door was opened (notably only after AIDS became a heterosexual disease), "it became easier for activists to use this new access to address issues of homophobia and gay oppression."<sup>89</sup>

AIDS activism "had engendered and also translated by the late 1980s into a more dynamic movement for gay and lesbian liberation."<sup>90</sup> D'Emilio highlights the cessation of municipal gay rights laws during the early years of the crisis that then "yielded to an upsurge" in the adoption of such measures both at the city and state level, with some state legislatures even joining gay pride parades and punishing hate crimes more severely in the aftermath.<sup>91</sup> Reagan's 1980 domestic platform of less government and increased individual volunteerism fostered a climate for civil activism in which the AIDS crisis "built a queer movement that didn't yet exist; it reconfigured [the] movement and [the] community in profound, irreversible ways."<sup>92</sup> These ways, in turn, had international implications.

Organisations such as GMHC, among others, that emerged in response to the needs of the gay community during the crisis have subsequently aided gay men in other Western countries as well as taken an international role in the advocacy of AIDS education and equality. On the other hand, the American government's slow response to AIDS and lack of funding for research played down the gravity of the epidemic. The resulting lack of centralisation or consensus on/ about research spurred a multiplicity of scientific views and discourse that translated into confusion not only for the American public but other impacted countries, particularly Africa.<sup>93</sup> As the leader in scientific research and pharmaceutical production in the 1980s, the US was the sole actor capable of providing the necessary research and correct information regarding AIDS to not only its own citizens but also the international community. Its inability to do so, and espousal of views such as those of Duesberg's, proved harmful for countries such as South Africa, whose presidents attributed AIDS to malnutrition thus allowing the disease to ravage the population.

In essence, by looking at the American gay civil rights movement under the lens of science and in the context of the AIDS epidemic, it becomes evident that science is inherently political. Neutrality, though ideal, is not possible due to manipulation and misinterpretation of scientific fact (and falsehood) by actors both external and internal to the field of enquiry. With respect to university research on issues such as AIDS, the institutionalised dichotomisation of science and politics as two distinct pursuits in universities is therefore injurious to society's ability to react to and resolve controversial issues, such as AIDS, that involve rights, science and contradictory viewpoints. The university, then, is an ideal place to begin reconciling science and politics by increasing synthesis and interdisciplinary learning within the two fields.

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<sup>1</sup> James Kinsella, *Covering the Plague Aids and the American Media* (New Brunswick: Rutgers

University Press 1989), 268. For the purpose of this essay, “gay” will refer to the male homosexual community as it did in the *New York Times* article. This is not to neglect the importance of the lesbian and transgender community but as to limit the scope of discussion and analysis.

<sup>2</sup> D’Emilio attributes the birth of the gay movement to the “sex segregation, geographic mobility and temporary freedom from the constraints of family” during WWII that “disrupt[ed] patterns of heterosexual sociability.” He argues this period instigated “development of a shared group identity among lesbians and gay men” in organisations such as the Mattachine Society in 1951 that worked to liberate minorities from persecution and magazines such as *ONE* that won a Supreme Court ruling protecting their rights to publish material about homosexuality – “the first significant legal victory of the gay community.” For in depth history of the movement see John D’Emilio, *The World Turned: Essays on Gay History, Politics, and Culture*, (London: Duke University Press, 2002), 81-95.

<sup>3</sup> Ibid. ix.

<sup>4</sup> See David Carter, *The Riots that Sparked the Gay Revolution*, (New York: St. Martin’s Press, 2004).

<sup>5</sup> Kenneth Mackinnon, *The Politics of Popular Representation: Reagan, Thatcher, AIDS, And the Movies* (Rutherford: Fairleigh Dickinson University Press, 1992), 116. Harvey Milk’s murderer, anti-gay conservative Dan White, received only five years parole.

<sup>6</sup> D’Emilio 96.

<sup>7</sup> Ibid. 95.

<sup>8</sup> Randy Shilts, *And the Band Played On: Politics, People, and the AIDS Epidemic* (New York: St. Martin's Press, 1987), 58-9.

<sup>9</sup> Ibid. 58.

<sup>10</sup> Shilts 39-40.

<sup>11</sup> William A. Check and Ann Giudici Fettner, *The Truth About AIDS: Evolution of an Epidemic* (New York: Holt, Rinehart and Winston, 1985), 218-9.

<sup>12</sup> Shilts 39-40.

<sup>13</sup> See Timothy F. Murphy, *Gay Science: The Ethics of Sexual Orientation Research* (New York: Columbia University Press, 1997), 75-83. The last clinic offering sexual reorientation in the US, Masters and Johnson Institute in St. Louis, closed in 1994. Murphy provides detailed accounts of aversion methods; while some medical professionals prescribed harmless remedies such as riding one’s bicycle when having homosexual urges, other methods such as electric shock were also available in the United States. A record of an attempted therapeutic aversion in Britain describes a therapist who injected a man with nausea-inducing drugs, playing audiotapes of homoerotic sex and surrounding a patient with glasses of urine.

<sup>14</sup> Shilts 30. Bill Kraus wanted repeal of such laws, to raise attention to these issues, as he felt a “strategy of enduring subservience” due to fear of risking the little that gays had gained was problematic because it meant not “fighting for what [gays] deserve.” Kraus felt New York gays thought of homosexual rights like a “driver’s license” (ie: privileges from the state). In this he felt, “The problem lies in believing that what we have gotten is somehow a favor given by politicians rather than the politicians’ recognition of what we have[:] the power to demand to get.” For full appreciation of the differing views of gay civil rights, see Shilts 31.

<sup>15</sup> Check & Fettner 247.

<sup>16</sup> Shilts 31-45.

<sup>17</sup> Ibid. 31-2.

<sup>18</sup> “Interview with Dr. Don Francis on *Frontline: The Age of Aids* (Educational Foundation, 2006), <<http://www.pbs.org/wgbh/pages/frontline/aids/>>.

<sup>19</sup> Kenneth W. Cimino, *Gay Conservatives: Group Consciousness and Assimilation* (New York: Harrington Park Press, 2007) 42. On July 3, 1981, the *New York Times* ran the story, “Rare Cancer Seen in 41 Homosexuals.” MacKinnon, 149.

<sup>20</sup> Shilts 78.

<sup>21</sup> Jamie L. Feldman, *Plague Doctors: Responding to the AIDS Epidemic in France and America* (Westport, CT: Bergin & Garvey, 1995) 13. She furthers “there is no knowledge without discourse and discourse can be defined by the knowledge that constructs it.”

<sup>22</sup> “Interview with Jim Curran” in *Frontline* (Educational Foundation, 2006), <<http://www.pbs.org/wgbh/pages/frontline/aids/>>. Dr. Curran reports, “While this had some acronym appeal, we rejected that at CDC because we had not known of any epidemics related only to a single community, and it made no sense that it would remain that way...”

Other medical professionals called it Autoimmune Thrombocytopenia Purpura (ATP), while pop culture came up with alternate names such as ‘toxic cock syndrome.’ implying that since sperm were meant for women, not

men, women had resistance to foreign invaders that came with it whereas men did not. In other words, God intended for “Adam and Eve not Adam and Steve.”

<sup>23</sup> Mark Carl Rom, “Gays and AIDS: Democratizing Disease?” in *The Politics of Gay Rights* (Chicago: University Of Chicago Press, 2000), 219.

<sup>24</sup> MacKinnon 160.

<sup>25</sup> Ibid. 160.

<sup>26</sup> Michael Lynch, “Living with Kaposi's”, *Body Politic*, 88 (November 1982) in Paula A. Treichler, “AIDS, homophobia and biomedical discourse: An epidemic of signification,” *Cultural Studies* 1(3): 268.

<sup>27</sup> Check & Fettner 230-1.

<sup>28</sup> Treichler 275.

<sup>29</sup> John Langone, *AIDS: The Facts* (Boston: Little Brown & Company, 1988), 31.

<sup>30</sup> See Alison Rawling, “The AIDS Virus Dispute: Awarding Priority for the Discovery of the Human Immunodeficiency Virus (HIV)” in *Science, Technology, & Human Values* 19(3): 2004).

<sup>31</sup> Thus, in literature prior to 1987, various names are used in place of HIV, including HTLV-III, LAV and AIDS-associated retrovirus (ARV).

<sup>32</sup> Langone 31.

<sup>33</sup> Check & Fettner 226-7.

<sup>34</sup> See Horton, “8: The Truth and Heresy About AIDS” in *Health Wars*, 249-279; Peter Duesberg, *Infectious AIDS: Have We Been Misled?: The Fallacy of the HIV-AIDS Connection* (California: North Atlantic Books, 1995); and Peter Duesberg, *Inventing the Aids Virus*, (Washington: Regnery Publishing, 1996).

<sup>35</sup> Horton 264.

<sup>36</sup> This discourse was not only detrimental to the furthering of legitimate AIDS research and the gay civil rights movement in the United States but further ignited the imagination of writers and political leaders in Africa who grasped the possibility that the West was misconstruing AIDS to their detriment. In the novel *Deadly Profit*, Patrice Matchaba tells a tale of a South African biotechnology company discovering a vaccine for HIV but being assassinated by American pharmaceutical companies which could not allow a vaccine because it would mean they had wasted \$30 billion in research and their drugs would be out of the market. This medical thriller was available in numerous bookshops during the 2000 World AIDS Conference in Durban, South Africa. See Horton 272-3 and Patrice Matchaba, *Deadly Profit* (South Africa: David Phillips Publishers, 2000).

However, Duesberg's views extend harm beyond fiction and did so into the reality of South African politics under President Mbeki who adamantly espoused incorrect views of causes of AIDS, such as transmission due to malnutrition. This furthered the spread of the epidemic rather than contributing positively to its control. See Horton 272-3.

<sup>37</sup> Kinsella 118.

<sup>38</sup> Rom 261.

<sup>39</sup> Ibid. 263.

<sup>40</sup> In MacKinnon 162.

<sup>41</sup> Kinsella 37-40.

<sup>42</sup> Curran in *Frontline*.

<sup>43</sup> Check & Fettner 210.

<sup>44</sup> Ibid. 247.

<sup>45</sup> D'Emilio 6.

<sup>46</sup> Shilts 286.

<sup>47</sup> Ibid. 290.

<sup>48</sup> Ibid. 354.

<sup>49</sup> Kinsella 40-1.

<sup>50</sup> See Roy Vagelos and Louis Galambos, *The Moral Corporation: Merck Experience* (Cambridge: Cambridge University Press).

<sup>51</sup> Two other antiretrovirals soon become available – Crixivan and 3TC. Scientists soon discover a combination of the three or ‘cocktail’ actually proves more effective in fighting the virus’ replication as it takes longer to build resistance when the three drugs are rotated.

<sup>52</sup> Joseph Schumpeter calls the intersection of scientific practices of molecular biology – which was formerly only undertaken by universities – with the engineering practices and technologies that could produce commodities a “new economic space”. It is also important to note the reluctance of many scientists to work for or be associated with biotech firms due to their limited credibility. Many preferred to stay on with reputable hospitals or universities rather

than make the leap to companies concerned with profits before the betterment of health. The new independent biotech industry was unique to the US in that most other countries (particularly Western) co-opt smaller firms under pharmaceutical, chemical or government industries. However, in the Reagan era, with starved funds, other industries were unable to finance such endeavours and thus emerged the less credible biotech industry of the 1980s.

See Sally Smith Hughes, "Making Dollars out of DNA: The First Major Patent in Biotechnology and the Commercialization of Molecular Biology, 1974-1980", in *Isis*, 92(3), (2001), 541-75. This paper explores the tensions over commercialization of academic biology, the ever-looming presence of national expectations to boost the country's economy and political ramifications regarding regulation of genetic engineering research immediately prior the Reagan years.

See also Mitchell Cohen, "Biotechnology and the New World Order" in *Redesigning Life? The Worldwide Challenge to Genetic Engineering*, ed. Brian Tokar, (Montreal: McGill-Queen's University Press, 2001), 206-14. Cohen elaborates on the politicization and corporatization of genetic science.

See also Kaushik Sunder Rajan, *Biocapital: The Constitution of Postgenomic Life* (Durham: Duke University Press, 2006). Rajan explores the recent evolution of biotechnology and how it rose to prominence under a theoretical lens and in the context of both science and political economy.

<sup>53</sup> Kinsella, 118.

<sup>54</sup> See Luigi Orsenigo, *The Emergence of Biotechnology: Institutions and Markets of Industrial Innovation* (New York: St. Martin's Press, 1989).

<sup>55</sup> Centers for Disease Control and Prevention, "Current Trends Acquired Immunodeficiency Syndrome (AIDS) Update", June 24, 1983 (Atlanta: US Department of Health and Human Services) < <http://www.cdc.gov/mmwr/preview/mmwrhtml/00000097.htm>>. Accessed December 6, 2007.

<sup>56</sup> Shilts 287.

<sup>57</sup> See Kinsella Chapter 1.

<sup>58</sup> Treichler 270 and Fettner in Treichler 270.

<sup>59</sup> Treichler 270.

<sup>60</sup> Arthur David Kahn, *The Many Faces of Gay* (Westport: Praeger, 1997), 247.

<sup>61</sup> Centers for Disease Control and Prevention, "Epidemiologic Notes and Reports Immunodeficiency among Female Sexual Partners of Males with Acquired Immune Deficiency Syndrome (AIDS) -- New York" 1983, (Atlanta: US Department of Health and Human Services) < <http://www.cdc.gov/mmwr/preview/mmwrhtml/00001221.htm>>. Accessed December 6, 2007.

<sup>62</sup> Kinsella, 265.

<sup>63</sup> Treichler 273

<sup>64</sup> Langone *The Facts* 82-5.

<sup>65</sup> John Langone, "AIDS: the latest scientific facts," *Discover* (December 1985), 40-1.

<sup>66</sup> In MacKinnon 127.

<sup>67</sup> Jim Curran in *Frontline*.

<sup>68</sup> Langone, *The Facts*, 84-5.

<sup>69</sup> Ibid. 85.

<sup>70</sup> Baker 19.

<sup>71</sup> Craig Rimmerman, *From Identity to Politics: The Lesbian and Gay Movements in the United States* (Philadelphia: Temple University Press, 2002), 98. Rimmerman speaks of more recent efforts (post-1992) to 're-gay' AIDS to raise awareness in the gay community.

<sup>72</sup> Fettner & Check 249.

<sup>73</sup> Shilts 19 and Kinsella 175.

<sup>74</sup> Kinsella 175.

<sup>75</sup> Shilts 414.

<sup>76</sup> Check & Fettner 248.

<sup>77</sup> Shilts 414-5.

<sup>78</sup> Simon Watney, director of UK AIDS charity, in Horton 264.

<sup>79</sup> In Rom 219.

<sup>80</sup> Shilts and Bayer in Rom 219.

<sup>81</sup> MacKinnon 127.

<sup>82</sup> Ibid. 148.

<sup>83</sup> Cimino 43.

<sup>84</sup> Frontline Timeline.

<sup>85</sup> Rom 228.

<sup>86</sup> Bailey 1992 in Rom 228.

<sup>87</sup> Francis Mark Mondimore, *A Natural History of Homosexuality* (Baltimore : Johns Hopkins University Press, 1996), 242.

<sup>88</sup> Mondimore 242.

<sup>89</sup> D'Emilio 86.

<sup>90</sup> Ibid. 87.

<sup>91</sup> Ibid. 87.

<sup>92</sup> D'Emilio 76 and Rom 230.

<sup>93</sup> Wayne R. Besen, *Bashing Back: Wayne Besen on Gblt People, Politics, and Culture* (New York: Harrington Park Press, 2007), 3. To the present day, AIDS is still a political disease, Besen believes it is now an “African disease.” Where “America first ignored AIDS because it primarily affected homosexuals...Now America is in denial about how the plague is ravishing Africans.” He continues, “The depressing truth is that if heterosexual white Americans were dying from aids at the same alarming rates as African Americans...Bush would launch a ‘war on AIDS’ that would rival his professed ‘war on terror’.”



UBC students Mia Taghizadeh and Braeden Caley photographed at a UBC event with Vancouver-Quadra Liberal Candidate Joyce Murray and Liberal Party Leader Stéphane Dion



# A Tale of Two Tiers: Privatization of Healthcare in Alberta and B.C.

Kathleen Addison

As Antonia Maioni often states, “Health care has become a lightning rod for federal-provincial conflict.”<sup>1</sup> This is particularly true in Alberta and British Columbia, which, as the forerunners of health care reform in Canada, have both come into increasing conflict with the federal government. In this paper I examine the extent to which British Columbia and Alberta converge and diverge in their relationships with the federal government in the jurisdiction of health care, particularly over violations to the *Canada Health Act* (CHA), which disallows user fees, queue jumping, and extra billing. I will argue that while both provinces have undertaken some reforms that violate the CHA, Alberta, despite its self-perpetuated reputation as a health care rebel, has engaged in fewer contentious reforms than British Columbia, which pays lip service to universal health care, while turning a blind eye to blatant violations of the CHA. Despite Alberta’s threats of extreme reform, it has backed away from significant change. Consequently, it has been penalised less than British Columbia but has always received more attention in this policy area because it has repeatedly and openly said it will defy the CHA. British Columbia has not openly challenged the federal government, but has, in fact, permitted breaches of the CHA, which have gone unpunished except for token fines imposed by the federal government. These provinces make an interesting comparison due to their similarities: conservative ideologies, Western alienation, “have” status, and population size.

## Background

Health care falls within provincial jurisdiction, but the Federal government controls much of the spending power, which it uses to regulate how the provinces run their individual, decentralised systems.<sup>2</sup> The CHA of 1984 officially made federal health care funding contingent upon the provinces’ upholding the five basic principles enshrined in the Act: Public administration, comprehensiveness, universality, portability, and accessibility.<sup>3</sup> Failure to uphold these principles, such as by allowing user fees and extra billing (dealt with in sections 18 to 21 of the Act), results in a mandatory deduction from the federal cash transfer.<sup>4</sup> It is often argued that for wealthier provinces, such as Alberta and British Columbia, the penalties are an inadequate incentive to adhere to the CHA because the federal cash transfers have diminished substantially in relation to the cost of health care. This intergovernmental conflict over lack of federal funding stems from the 1977 agreement stipulating that the federal government was no longer required to provide half of the money for public health care, and instead would transfer tax credits to the provinces to pay for half of the federal government’s contribution.<sup>5</sup> Since then, the federal government has unilaterally reduced the amount of money it transfers to the provinces through repeated budget cutbacks, reaching a low of payment of ten percent of provincial health expenses in 1998. The transfer payments subsequently increased due to intergovernmental agreements over the last nine years, but have never returned to their original level.<sup>6</sup> As a result, the financial carrot used to keep the provinces in line with Ottawa’s plan for health care has become increasingly ineffective.

Alberta and British Columbia have both experimented with two-tier policies that violate the CHA, putting them in conflict with the federal government over the extent to which Ottawa has a right to dictate how the provinces should run their own health care systems. Provincial autonomy has become an even greater issue for both these provinces because simply pumping money into the provincial systems has not proved successful in fixing problems such as long wait times. The provinces, particularly Alberta and British Columbia, want more autonomy to decide how to make their own health care structures more efficient and “sustainable.” Their approach finds support in the Supreme Court ruling in the *Chaoulli* case, which could have legal ramifications for all provinces. Two judges wrote that, “access to a waiting list is not access to health care,” which, if nothing else, opened the door to the idea that Canadians should be able to choose a second option if the universal system is taking too long.<sup>7</sup> While the two western provinces have both challenged federal regulation of health care, each has taken a different approach.

## Alberta

The intergovernmental conflict between Alberta and Ottawa began in the early 1990's. At the time, two main issues for Alberta were the unilateral method that the federal government used to interpret the CHA and cut funding, and the lack of clarity of the federal government's health care policy, which Alberta saw as blocking provincial reform. Furthermore, new technology meant that more procedures could be covered outside of traditional hospitals. Alberta thought that the federal government's exclusion of MRIs and other diagnostic tests from the CHA was a mistake and wanted Ottawa to take a clear position on private clinics and cataract surgery.<sup>8</sup> The uncertainty surrounding what was or was not acceptable under the CHA was partly cleared up in 1993 when, at the federal level, the Progressive Conservatives were replaced by the Liberals, who drew a line and took a firmer stance on enforcing the CHA.<sup>9</sup>

Historically, Alberta has always encouraged private sector involvement in social service delivery, such as private clinics, which have "tested the boundaries of the CHA."<sup>10</sup> Alberta's 1993 Gimbel Foundation Act, which would have allowed facility fees to be charged, was voluntarily withdrawn; however, it caught the federal government's attention and prompted federal-provincial meetings about privatization and user fees in 1994. At these meetings, it was agreed that all provinces had to eliminate user fees by October 15<sup>th</sup>, 1995, or face penalties.<sup>11</sup> Alberta was one of the few provinces not to agree with this decision, and unsuccessfully asked for more time for consultations. Alberta's then-premier, Ralph Klein, publicly dared Ottawa to penalize him for violating the CHA. When Alberta was penalised \$3.585 million in lost transfers, far more than any province, Klein backed down and covered the fines out of the provincial treasury.<sup>12</sup> Under continued pressure from the federal government, Alberta came up with a 12-point policy statement, which committed to end facility fees for publicly-insured services by October 1<sup>st</sup>, 1996.<sup>13</sup> Bill 21 (the *Alberta Health Care Insurance Amendment Act*) and Bill 37 (the *Health Statutes Amendment Act*) were created to satisfy the federal government's demands to entrench the policy statement in law. Bill 21 prohibited the charging of any user or facility fees for any procedure (whether publicly covered or not) by physicians opted into medicare. Bill 37 was intended to establish guidelines to allow for for-profit health care, including the use of non-hospital surgical facilities.<sup>14</sup> However, the Alberta government withdrew Bill 37 under voter and federal pressure in 1998. Instead, the following year, Klein put even stricter controls on private surgeries.<sup>15</sup>

In November, 1999, Alberta proclaimed their commitment to the CHA, declaring that "there will be no private hospitals; there will be no parallel health system."<sup>16</sup> This opened the door for Bill 11, the *Health Care Protection Act*, passed in 2000, which consolidated all previous provincial health care legislation into one act. Although the law proposed reforms such as limiting private, non-hospital surgical facilities to those approved by the Minister of Health (who would consider the CHA and public interest), and prohibiting fees and queue jumping for insured services, it was controversial because it allowed for a greater role for the private sector.<sup>17</sup> Those opposed to the legislation worried it would set Alberta on the slippery slope to private hospitals and two-tier medicine by legally outlining a framework permitting private facilities.<sup>18</sup> Also in 2000, the federal government ruled that 2600 patients who paid for MRIs at private clinics had essentially paid user fees. Ottawa did not penalize Alberta, but upon recommendation of Alberta's MRI Review Committee, the province paid over \$1 million to reimburse those patients who had paid for procedures.<sup>19</sup> (This is one example of Ottawa's failure to punish a wealthier province for bending, rather than breaking, the rules.)

The Mazankowski Report, released in December, 2001, was a result of the Premier's Advisory Council on Health's eighteen month investigation into how to control health care spending in Alberta.<sup>20</sup> At the request of Premier Klein, Mazankowski, a cabinet minister and deputy prime minister under Brian Mulroney, chaired the council. It condemned the current system, calling it an "unregulated monopoly" and a "command and control central planning approach."<sup>21</sup> The Report included recommendations allowing Albertans to purchase both insured and uninsured services from private clinics (user fees), introducing forms of co-payment such as a medical savings account, and creating a panel to limit what was covered under universal health care.<sup>22</sup> Of the report's 44 recommendations only the ones that would not violate the CHA were adopted by Alberta under Klein's plan for provincial reform, called *Alberta*:

*Health First, Building a Better Public Health Care System.*<sup>23</sup> A panel was also set up to delist certain services, and although Klein consistently threatened to violate the CHA by allowing patients to purchase private care for insured services and use co-payment plans, he did not act on those threats.<sup>24</sup>

Under Ralph Klein, the Alberta government repeatedly put forward controversial health care legislation but later retreated. He continued to confront Ottawa, when, in 2004, he left the First Ministers' Conference on health care after the first day in protest, and sent in his place Alberta Health Minister Gary Mar.<sup>25</sup> In the same year, he declared himself prepared to engage in "un-Canadian plans [which would] contravene the interpretation of the *Canada Health Act*."<sup>26</sup> Most recently, in February, 2006, Klein announced his "Third Way" plan for health care in Alberta. Federal Health Minister Tony Clement called it a clear violation of the CHA because it would allow patients needing hip and knee replacements to jump queues for these surgeries if they were willing to pay, and because it would allow doctors to work in both the public and private health care systems.<sup>27</sup> Over a month after Klein proposed his "Third Way", Harper sent him a letter warning that Alberta risked violating the *Canada Health Act*.<sup>28</sup> Klein said,

"What happens in Alberta really is of no concern to the other premiers or health ministers, insofar as we make sure we live up to *some* of the fundamental principles of the *Canada Health Act*."<sup>29</sup>

When asked about this issue, Klein declared outright that he would not hesitate to violate the *Canada Health Act*, essentially challenging Ottawa to stop him. In the end, the two-tier "Third Way" was abandoned by Klein's government not because of the Federal government's threats to withhold up to \$1.75 billion in health transfers, but due to opposition from the vast majority of Albertans, combined with Klein's earlier-than-planned retirement.<sup>30</sup> Klein dropped the two reforms that would have violated the CHA.<sup>31</sup> Ultimately, Ottawa failed to address the question of what it could do, should the situation arise again, "to ensure compliance by a cash-flush province that may no longer be hobbled by a cut in federal transfer payments."<sup>32</sup>

Klein came to power determined to create a larger role for the private sector in health care, in an attempt to distinguish himself from the unpopular leadership before him and cut the provincial debt.<sup>33</sup> However, interest groups alerted the federal government to the possible violations of the *Canada Health Act*. Under the close watch of Ottawa, Klein was forced to pass legislation which more tightly controlled private health care, although this legislation is narrow in scope, restricting only the most controversial, visible private sector activity.<sup>34</sup> Klein's replacement, Ed Stelmach, appears to want to distinguish himself from Klein's fondness for promising a larger role for the private sector in health care, and then backing down under pressure from the federal government. Public opinion seems to indicate, furthermore, that "the damage inflicted by Klein's bumbling public relations strategy has left Alberta less prepared to modernize its health care system than other provinces."<sup>35</sup>

Despite repeated assertions by its government that Alberta will do what it wants with its own health care system irrespective of whether this means violating the CHA, Alberta lags behind British Columbia (and Quebec) in terms encouraging of private health.<sup>36</sup> Premier Klein, was designated the "Darth Vader of health care" for the drastic reforms he promised throughout his fourteen-year mandate, most of which never materialised.<sup>37</sup> As the editor of the *Calgary Herald* put it,

"British Columbia experimented with private health care under a left-wing [NDP] government... But when confronted by former prime minister Jean Chrétien, Martin or their fear-mongering health ministers, Alberta Conservatives—conservatives!—get weak in the knees and backtrack on the mildest of reforms, preferring press conferences to pressing ahead with... changes."<sup>38</sup>

## British Columbia

While Alberta has received much of the public and federal government attention, British Columbia, and particularly Premier Gordon Campbell, has been quietly encouraging the growth of private health care by turning a blind eye to private clinics, while outwardly supporting universal health care.

Initial fines imposed on British Columbia by the federal government for violating the CHA between 1984 and 1987 were refunded, under the section of the Act which gave the provinces a three year window in which to comply. The next violation of the CHA by British Columbia fell between 1992 and 1996, during which time British Columbia was fined \$2.025 million for extra billing.<sup>39</sup> This was because several doctors opted out of the provincial health insurance plan after a dispute between the British Columbia Medical Association and the British Columbia government. They proceeded to bill patients individually for services at a rate higher than what they could get back from the provincial government. Following this, British Columbia provided the federal government with a financial statement for the 2000-2001 fiscal year, stating that \$4,610 had been charged in the form of extra billing and user charges; this amount was deducted from the federal government's CHST payment in 2003.<sup>40</sup> In 2004, the British Columbian government refused to submit the CHA-required report of user charges and extra billing, until the federal government defined what it meant by "medically necessary" and "medically required" in the *Canada Health Act*.<sup>41</sup> This conflict was not resolved, so the federal government deducted \$126,775, the amount Canada Health estimated had been spent on these two things in the fiscal year 2001-2002.<sup>42</sup> In 2005 and 2006, \$72,464 and \$29,019 were deducted, respectively, based on the resumed reports of the government of British Columbia.<sup>43</sup> These trifling fines demonstrate how little the federal government can do to enforce the CHA.

Premier Campbell is the spokesman for the group "Friends of Medicare" and makes repeated public commitments to universal healthcare, such as by supporting Quebec's bid to disallow private care in the Chaoulli decision.<sup>44</sup> However, as the deductions show, British Columbia continually violates the CHA by allowing private clinics to charge user fees and extra-bill patients. One example of this vacillating position is Bill 92, which was unanimously passed in the British Columbia legislature in December, 2003. It was created under pressure from the Chrétien government to deal with extra-billing physicians by implementing fines of \$10,000 for a first infraction and \$20,000 for a second.<sup>45</sup> This amendment to the *Medicare Protection Act* (MPA) would also have shut down private diagnostic facilities and allowed the provincial government to audit and fine private clinics charging user fees and billing patients for services covered under public health care.<sup>46</sup> Five days after it was passed, Martin took over as Prime Minister. Premier Campbell, who was not in the legislature when the bill was passed, stopped its proclamation under pressure from private health care providers, and because a liberal spokesperson for the new Martin government stated that it was the decision of the provinces how they decide to respect the CHA, the legislation never became law.<sup>47</sup> In light of the fact that federal pressure had lessened considerably, Campbell's view was that, "I think it may turn out we don't need it."<sup>48</sup> The bill was re-introduced in February, 2006, by a NDP MLA, and defeated by the legislature.<sup>49</sup>

In the 2006 Throne Speech, the Campbell government made several health care promises. The first of these was a three-year discussion among British Columbia's citizens, politicians, and health care workers about updating and strengthening the CHA, known as the "Conversation on Health."<sup>50</sup> The second was the codification of the CHA's five principles (and the addition of a sixth, sustainability) in provincial legislation, a step which Alberta accomplished with Bill 11 almost seven years ago.<sup>51</sup> Campbell has yet to follow through on this second promise, perhaps because he is waiting to see if the Conversation on Health will confirm results that British Columbians are in favour of allowing for-profit clinics.<sup>52</sup> Questions included in the "Conversation on Health" inquire into whether patients care if private facilities are used to deliver publicly-paid care, and why British Columbians are afraid of a different delivery model, such as those used in Europe.<sup>53</sup> Currently, Campbell's government is reviewing the results of the Conversation on Health, and plans to begin bringing them forward in Spring 2008.<sup>54</sup>

In the words of NDP health critic Adrian Dix, "The government's position on private health care has been 'Don't ask, don't tell.'"<sup>55</sup> In December, 2006, under opposition scrutiny, Campbell admitted turning a blind eye to at least 1,100 infractions of the *Canada Health Act* and the *Medicare Protection Act* in British Columbia.<sup>56</sup> These infractions involved allowing private companies to charge fees to jump queues for MRIs at St. Paul's and Mount St. Joseph's Hospitals, both of which are public hospitals.<sup>57</sup> Campbell promised to reimburse patients for these fees. Under the existing form of the MPA, the

predominant remedy for breaches of the Act involve the recovery of the fees paid to the physician and reimbursement of the patient who paid them.<sup>58</sup>

Another violation to the *Canada Health Act* that Premier Campbell has been ignoring for the most part, is the operation of numerous private clinics which employ doctors who are enrolled in the Medical Services Plan (MSP) and also bill patients privately. The MSP is the public health insurance program in British Columbia, which is administered by the Medical Services Commission, which is made up of equal numbers of government, the BCMA, and public representatives. In British Columbia despite the legislation against it in the MPA, there are several clinics openly operating in contravention of this, because the doctors who provide private care (primarily surgical) at those clinics are enrolled in the MSP and provide public health services both in their private offices and in public hospitals.<sup>59</sup> In effect, then, British Columbia has a limited two-tier health system, and has had for at least the past ten years (even under the NDP). As National Post columnist Don Mills writes, the provincial government has “conveniently found none among the half dozen in Vancouver that...violate the *Canada Health Act*.”<sup>60</sup>

One controversial private clinic, Dr. Godley’s False Creek Urgent Care Centre, which opened in December, 2006, got immediate government attention. It planned to provide urgent services such as setting broken bones and stitching cuts, for fees that included \$199 for an evaluation fee followed by \$50 for X-Rays or blood tests, and \$70 to set an arm in a cast.<sup>61</sup> Services in this vein are considered medically necessary; therefore, this clinic would have been violating the CHA by charging user fees for services covered by MSP. Although the government had been aware of the plans for the clinic prior to its opening, the publicity and controversy following its opening led the government to shut it down the day after it opened for violating the CHA and MPA.<sup>62</sup> Campbell had to be seen as doing something, so he resurrected the weakest parts of Bill 92, which would allow the provincial government to audit the clinic to ensure its billing procedures was not violating the MPA, and if it were, this gave the British Columbia government the right to take it to court to shut it down.<sup>63</sup> The clinic was only allowed to re-open after agreeing that it would accept any patient and would be paid by the MSP a set fee of \$35 per visit.<sup>64</sup> This model proved unworkable within a few weeks, and the clinic began turning away people who were covered by MSP because, as Godley says, “right now being paid through the Medical Services Plan simply results in us having to subsidize the care of patients.”<sup>65</sup> Public opinion seems to be that this response was only given to the Urgent Care Centre because it did not disguise its violations. This clinic, like about 50 other private surgical centres, is now catering particularly to members of the federal Canadian Armed Forces, RCMP or corrections service, and to workers covered by provincial workers' compensation, all of whom are exempt from the *Canada Health Act*.<sup>66</sup>

These private clinics obviously defy the spirit of the CHA, but are perfectly legal under the MPA. In British Columbia, a doctor can opt out of the MSP (that is, not bill the provincial government) and charge whatever the market will bear for any service he wishes, even those covered under the MSP as essential services, such as cataracts or hernia surgery. It is legal so long as the doctor opts out of the MSP and uses a private facility.<sup>67</sup> If a doctor is caught double billing or using a public facility to provide private services, he has to pay the money charged back to the patient, and can be removed from the MSP so he can no longer bill the government. Compared to Alberta, which has fines of \$10,000 for the first such offence and \$20,000 for the second under section four of the *Health Care Protection Act*, these are insignificant punishments. Furthermore, in Alberta, it is illegal for doctors to provide insured services in a facility which is not approved by the provincial government, and the provincial government only chooses to approve public facilities, in which it is illegal for doctors to perform private surgeries even if they are opted out of the provincial health care plan.

## Conclusion

Alberta’s and British Columbia’s provincial governments are the two champions of health care reform and privatization inconsistent with the CHA. As such, they have come into repeated conflict with the federal government for violations of the *Canada Health Act*, particularly through user fees, extra billing, and privatization. Despite publicly praising universal health care, the British Columbia government’s failure to acknowledge and stop violations to the CHA by private clinics has resulted in it

being the most privatized province, essentially with a limited two-tier system. Meanwhile, the Alberta government under Klein overtly challenged Ottawa's control over health care, but only succeeded in attracting federal attention to such an extent that Alberta was pressured into backing away from meaningful privatization of health care, and, in the end, complied with the CHA. Conversely, Premier Campbell's government has talked as though it entirely supports the CHA and public health care, while crafting one of the most permissive pieces of health care legislation, and turning a blind eye to contraventions of the CHA and MPA.

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<sup>1</sup> Antonia Maioni, "Is public health care politically sustainable?" (Lecture, *Breakfast on the Hill* seminar, Canadian Federation for the Humanities and Social Sciences, Montreal, QC, 5 December, 2002).

<sup>2</sup> Ibid.

<sup>3</sup> Health Canada, "Overview of the *Canada Health Act*," Health Care System, [http://www.hc-sc.gc.ca/hcs-sss/medi-assur/overview-apercu/index\\_e.html](http://www.hc-sc.gc.ca/hcs-sss/medi-assur/overview-apercu/index_e.html).

<sup>4</sup> Ibid.

<sup>5</sup> Armine Yalnizyan, "Getting Better Health Care: Lessons from (and for) Canada," *Canadian Centre for Policy Alternatives* (2006), [http://www.policyalternatives.ca/documents/National\\_Office\\_Pubs/2006/Getting\\_Better\\_Health\\_Care.pdf](http://www.policyalternatives.ca/documents/National_Office_Pubs/2006/Getting_Better_Health_Care.pdf), p. 16.

<sup>6</sup> Ibid.

<sup>7</sup> *CBC News Online*. 2006. Indepth: Health Care; Introduction. August 22.

<sup>8</sup> John Church and Neale Smith, "Health reform and privatization in Alberta (Author abstract)," *Canadian Public Administration* 49.4 (Winter 2006), [http://find.galegroup.com/itx/infomark.do?&contentSet=IAC-Documents&type=retrieve&tabID=T002&prodId=EAIM&docId=A158837980&source=gale&srcprod=EAIM&userGroupName=crepuq\\_mcgill&version=1.0](http://find.galegroup.com/itx/infomark.do?&contentSet=IAC-Documents&type=retrieve&tabID=T002&prodId=EAIM&docId=A158837980&source=gale&srcprod=EAIM&userGroupName=crepuq_mcgill&version=1.0).

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Alaska Highway News, "One set of rules for all provinces," *Alaska Highway News*, May 15, 2006, Final Edition, <http://proquest.umi.com/pqdweb?did=1037659351&sid=1&Fmt=3&clientId=10843&RQT=309&VName=PQD>.

<sup>13</sup> Health Canada, "*Canada Health Act*: Federal Transfers and Deductions."

<sup>14</sup> Church and Smith, "Health reform and privatization in Alberta."

<sup>15</sup> Kevin Libin, "Private care loses Alberta's support: Tories back Medicare," *National Post*, January 10, 2007, National Edition, <http://proquest.umi.com/pqdweb?did=1192937331&sid=2&Fmt=3&clientId=10843&RQT=309&VName=PQD>.

<sup>16</sup> Church and Smith, "Health reform and privatization in Alberta."

<sup>17</sup> Cynthia Ramsay, et al, "The Alberta Health Care Advantage: An Accessible, High Quality, and Sustainable System," *The Fraser Institute's Public Policy Sources*, no.81 (2004), <http://www.fraserinstitute.ca/admin/books/files/ABHealth.pdf>, p. 40.

<sup>18</sup> Ibid.

<sup>19</sup> Tammy Horne and Susan Abells, "Public Remedies, Not Private Payments: Quality Health Care in Alberta," *Parkland Institute Report* (2004), <http://www.ualberta.ca/~parkland/research/studies/health.pdf>, p. 81.

<sup>20</sup> CBC News Online, "Indepth: Health Care; Studied to death?" *CBC News*, June 10, 2005, <http://www.cbc.ca/news/background/healthcare/studiedtodeath.html>.

<sup>21</sup> Jim Grieshaber-Otto and Scott Sinclair, "Bad Medicine: Trade Treaties, privatization and health care reform in Canada," *Canadian Centre for Policy Alternatives*, [http://www.policyalternatives.ca/documents/National\\_Office\\_Pubs/bad\\_medicine.pdf](http://www.policyalternatives.ca/documents/National_Office_Pubs/bad_medicine.pdf), p. 38.

<sup>22</sup> CBC News Online, "Indepth: Health Care; Studied to death?"

<sup>23</sup> Ramsay, et al, "The Alberta Health Care Advantage," p. 3.

<sup>24</sup> Grieshaber-Otto and Sinclair "Bad Medicine," p. 37.

<sup>25</sup> D34

<sup>26</sup> Libin, "Private care loses Alberta's support."

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## **Genetically Engineered Crops, Food Security and Regulation in sub-Saharan Africa**

Rhianon Bader

In the West, ‘famine’ and ‘sub-Saharan Africa’ are often considered synonymous. How, people wonder, can a region where 60 to 80 per cent of the labour force works in agriculture go hungry? The root problems of food insecurity in African states are numerous and complicated, yet the answers from the West are often inappropriate and fail to question the problems inherent in the global system itself. The most recent “magic wand solution” to food insecurity is agro-biotechnology and, specifically, Genetically Engineered Organisms (GEOs) in the form of food crops. Defined as “organisms whose DNA has been purposefully altered in a way that does not occur naturally by mating or natural recombination” (Andree, 2007, p.2), GEOs are touted as a revolution in food production due to their declared potential for increasing yields, nutrition and environmental sustainability. GEOs are almost exclusively grown commercially in the United States, Canada and Argentina. The European Union (EU), on the other hand, has adopted a “precautionary approach” to genetically engineered (GE) crops (Taylor, 2007, p.xxviii), pushing for “biosafety” regulations and awareness of the uncertain risks to biodiversity and human health.

While genetic engineering may have the potential to increase food security in sub-Saharan Africa, the risks associated with biotechnology, both known and uncertain, are currently far more numerous than existing gains for the region. Since the mid-1990s, numerous actors, including NGOs, states, regional bodies and international organizations, have recognized the need for regional if not continental consensus on biosafety regulations, especially due to the ability of GEOs to cross boundaries and borders. While acknowledging that it is important for sub-Saharan Africa to remain open to technological breakthroughs that can increase agricultural production and food security, there are a number of challenges that affect the region’s ability to explore this possibility in the precautionary and comprehensive manner that is required.

### **Background: GEOs, Food Security and Regional Consensus**

Agriculture employs an often overwhelming majority of the work force in most sub-Saharan African nations. Seventy-three per cent of rural farmers in the region work on labour-intensive, smallholder farms. The majority of farmers are women, who contribute 60 to 80 per cent of the labour for food meant both

for consumption and sale (Food and Agriculture Organization, 1995). With the exception of a few African countries, GE crops have been grown outside of the continent, at an increasing rate of 10 per cent annually since 1996, though they still comprise less than 10 per cent of the world food supply (Grebmer and Omamo, 2005, p.173). Though it could, and has, been argued that biotechnology is nothing new in that selective breeding to produce desired traits in offspring has existed since agriculture itself, genetic engineering is a wholly novel technology “with all its implications of calculated and precise human intervention” (Taylor, p.xxviii).

Most multinational GE crops on the market are large-scale cash crops such as maize, cotton, soybean, canola and tobacco, primarily designed for herbicide and pest resistance rather than increased yields. The focus on crops consumed by the West, rather than those that are more suitable to the South like cassava, millet and cowpeas – perhaps engineered for drought-resistance – is because the developing nations in the South are seen as the least profitable commercial customers (Paarlberg, 2001, p.4). The tendency for biotechnology to favour large-scale producers and products that are inappropriate for African markets has led some to point out that the problem is not with the technology itself, “but the conditions under which it is produced” (Zerbe, 2005, p.180). Others argue that genetic engineering should be rejected entirely on the grounds that it is not only inefficient for the South, but also dangerous. The claims of multinational corporations (MNCs) like Monsanto that GEO increase food security, yields and environmental sustainability through decreased herbicide/pesticide use have all been debated. Scientists have found that GE can decrease biodiversity, increase herbicide/pesticide use and show negative production gains (Shiva, 2000, pp.95-100). Perhaps the most compelling argument against GE food crops is that there have been many successfully ecological alternatives for controlling pests and weeds in Africa, such as a system developed in Kenya that controlled stemborer pests by drawing them away with “trap crops,” resulting in 15 to 20 per cent yield increases (Taylor, p.38).

There are a variety of ways in which GEOs can threaten food security in the largely agricultural sub-Saharan region. It is first important to note that “at present, real food security problems are caused, more than by food shortages, by inequity, poverty and concentration of food production” (Zarrilli, 2000, p.4). Therefore the most worrying aspect of GE crop adoption is that the farming techniques required are not appropriate for the low-input, labour-intensive farming methods employed by smallholders in the region, meaning that “biotechnology may change the nature, structure and ownership of food production systems” for the worse (Zarrilli, p.4). The displacement of smallholder production by capital-intensive, labour-saving cash crops would likely consolidate ownership power and worsen both unemployment and inequality (Zerbe, p.19). The repercussions this would have on women is especially troubling as the large-scale production favours male labour, while women have traditionally been the most active in agriculture and are the “key to food security through seed selection and storage” (Zerbe, p.97). Indeed, the seed-sharing practices of smallholder farming are becoming increasingly jeopardized by international patents as MNCs capitalize on nature. The “technology fees” charged by GE seed companies to regain research and development costs and the various chemicals required increase input costs that can financially cripple small farmers, who, once they plant GE crops, cannot get rid of them (Shiva, p.101; Paarlberg, p.3). Not paying for patents on GE crops, even if they blew into one’s field from one’s neighbour, has resulted in lawsuits around the world, as well as so-called “terminator technologies” that make seeds infertile to ensure that they are bought anew each year.

Another repercussion, which is already an issue with non-GEO cash crops, is that the expansion of non-food (tobacco, cotton) and export crops results in less diverse agricultural output and fewer acres for domestic food production, thus aggravating food security. This “monoculturalization” of agriculture with GE crops also has significant dangers for the South’s massive biodiversity, and especially non-GE crops. Dangers include the spread of GE transgenes to weeds (making them herbicide resistant), the destruction of local varieties through cross-pollination, rapid pesticide resistance developed by pests, and harmful effects on non-target insects (Taylor, p.39). This means that we see local crop varieties developed over centuries for specific traits relating to survival, nutrition, processing and storage wiped out by GEOs – and this would happen with individual farmers, and plausibly even countries, being unable to stop it.

The issue of GE crop adoption affects every African country, albeit more extensively for those

that rely most heavily on agriculture. The fact that GEOs “have no respect for field boundaries nor for borders between states” (De la Perriere and Seuret, 2000, p.68) is further problematic for the sub-Saharan region because of the high level of transboundary movement of goods and people (Grebmer and Omamo, p.156). Consequently, it is necessary for a consensus to be reached regionally, and ideally continentally, regarding GEOs, whether it be an outright rejection of GE crops or a common, *enforceable* regulation process for GEO importation, field tests and commercial growing. What makes the GEO issue especially pressing is that “it is almost certain that once a new gene is released from containment into a farming environment, it can never be recalled should it be found to be faulty” (Taylor, p.xxvii), therefore the decision to approve of GE crops cannot realistically be reversed entirely. In 2000, Africa was GE-free except for small quantities of maize and cotton crops in South Africa (Paarlberg, p.44). Even today, only a handful of other African states have established national policies and regulations on biosafety, which may put the continent at risk of becoming a potential testing ground for multinational biotechnology companies wishing to circumvent the stricter regulations of industrialized nations (De la Perriere and Seuret, p.19). This has already happened in Burkina Faso in 2003, where test trials on Bt cotton began without public debate or regulations in place (COPAGEN, Aug. 2007, p.2). Aside from the geographical need for a continental consensus, there is also an important political advantage to African solidarity on the GEO issue. By speaking with one voice and knowing that one’s neighbouring states are following the same policy, countries would be less vulnerable to pressure from external actors, and so could consider the risks and benefits of biotechnology without it being imposed on African countries prematurely.

### **Addressing the GEO issue: National, Regional and International Efforts**

The current attitudes and regulations of African nations towards GE crops have so far been largely precautionary, following the lead of the EU. Thus far, “agrobiotechnology has been greeted with a mix of hope and suspicion” in Southern Africa and the rest of the continent (Zerbe, p.80). While the majority of the public and farmers are unaware of biotechnology, the lingering uncertainties and heavy reliance on agriculture in African countries means that those with some knowledge of GEOs tend to be generally “risk-averse” (Grebmer and Omamo, p.116). The need for greater continental awareness on biosafety at all levels of society is apparent in that only Kenya, South Africa, Egypt, Zambia, Malawi and Zimbabwe have the regulations *and* legal mechanisms in place to ensure the safe development and application of biotechnology (Grebmer and Omamo, p.16; Taylor, pp.265-267). Of these countries, all have begun testing field crops, along with Senegal, Burkina Faso and Morocco, and only South Africa has been commercially growing crops – pest-resistant Bt maize and cotton – since the late 90s (Taylor, p.266-269). South Africa’s GMO Act of 1997 is one of Africa’s most developed, with an extensive application approval process that takes into account input from experts, the public sector and the public, and appoints inspectors to ensure that GE farming adheres to the GMO Act (Taylor, p.266).

In sub-Saharan Africa there have been substantial efforts on the part of countries and sub-regional organizations to protect the region from the potential environmental and economic risks of GE crop production. Kenya, though it has allowed sweet potato field trials and has had its National Biosafety Committee (NBC) and biosafety guidelines for as long as South Africa, has purposely adopted more precautionary biosafety policies “in part out of bureaucratic weakness” and fewer resources to implement and enforce them (Paarlberg, pp.50-51). So far there have been no commercial GE crops allowed and there are import restrictions on GEOs (Paarlberg, pp.54-56). Kenya also purposely maintains weak patent protection for plants in order to guarantee greater farmer’s rights for replicating and replanting patented seeds on their own farms – this is a large discouragement to multinationals bringing their GE seeds there (Paarlberg, p.48). Informal seed networks in sub-Saharan Africa – where seed is saved from previous harvests or acquired from relatives, neighbours or through exchange – are greatly threatened by ‘patents on life’ that multinational seed companies rely on. The Southern African Development Community

(SADC) recognizes the importance of seed networks to smallholder farming and has encouraged them, focusing especially on staple foods like local maize, sorghum and millet (Zerbe, p.149). In Zimbabwe, where networks for maize seed research, production and distribution to smallholders have existed for decades, the government is resisting the approval of GE seeds without extensive field testing first (Zerbe, pp.107,161). SADC has identified biodiversity and indigenous knowledge as “critical priorities for future development” (Zerbe, p.184). The “no patents on life” movement, whose leading proponents are Zimbabwe, Ethiopia and Kenya, is supported by farmers, AIDS activists, environmentalists, indigenous groups and by the Africa Group at the WTO Doha Round (Zerbe, pp.175,184). Dr. Tewolde Egziabher of Ethiopia, who has been a leading representative for developing countries in numerous international GEO negotiations, started a pit-composting project based on traditional Indian farming practices that has increased yields “over and above chemical fertilizers,” resulting in the Ethiopian government considering organic farming as one of its strategies for food security (ISIS, Oct.4, 2004).

Undoubtedly the most pronounced representation of the precautionary position on GEOs within Africa was the rejection of US food aid containing GE maize by Malawi, Mozambique, Namibia, Zambia and Zimbabwe during the food security emergency in 2002/2003. Due to fears of GE food being replanted and contaminating local varieties (including livestock fed on the crops), the countries demanded milled GE products, and Zambia refused GE food entirely (Grebmer and Omamo, p.29; Taylor, p.316). A statement by the group of Southern countries regarding their actions said that GE foods have not yet been debated in these countries and are being “prematurely forced upon the region in the guise of food aid” by making Africa choose between starvation and GE food (Magalasi, 2003, pp.162-163). They expressed a preference for exploring modern ecological farming approaches that do not compromise the environment or risk dependency on multinational seed companies (Magalasi, p.163). The US reaction, and that of other relief/donor agencies, is bluntly summed up in the statement of a US official in 2002: “beggars cannot be choosers” (Grebmer and Omamo, p.29). And yet they chose, but the operational problems of some countries wanting to keep GEOs out of their borders and others needing to transport food aid meant that costly, ad hoc measures came into place to ensure minimal “escape” (Grebmer and Omamo, p.2). The problems arising from a “lack of a harmonized (regional) position” on GEOs was brought up in a 2002 SADC meeting, which deemed it necessary to engage in bilateral consultations on the GE debate, and also created an advisory committee on biotechnology and biosafety to establish guidelines to protect member states from the potential risks of GEOs to trade, food safety/security, biodiversity contamination, and ethical/consumer concerns (Grebmer and Omamo, p.2). There has been a similar call for regional legislation on GEOs in West Africa by local NGOs in response to field trials being undertaken in Burkina Faso under pressure from Western actors, despite not yet having biosafety legislation in place (COPAGEN, p.2). One NGO operating in Benin, Burkina Faso, Mali, Senegal and Togo stated that “Our countries and our region are not up for sale. Our sovereignty is not tradable” (COPAGEN, p.4).

Intellectual Property Rights (IPRs) go hand-in-hand with GEOs. Because of the weak patent laws in many developing countries, an agreement on Trade-Related aspects of Intellectual Property Rights (TRIPs) was established under the WTO in 1994, both extending what could be patented (life forms), and for how long (Zerbe, p.52). Prior to this agreement, patents were solely the domain of national law, and so TRIPs effectively diminish the power of traditional norms thus giving MNCs and the US biotech industries greater access to the markets of developing countries (Zerbe, pp. 52-53,161). TRIPs have been criticized as legalizing “biopiracy,” whereby the benefits from exploiting the South’s biodiversity accrue almost exclusively to Western corporations (Zerbe, p.69). Member states within the Organization of African Unity (OAU) recognized that “the system of intellectual property rights envisioned under the TRIPs regime was inefficient to protect the traditional knowledge and biodiversity of Africa” (Zerbe, p.185) and so in 1997 they initiated a draft African Model Law on Safety in Biotechnology, which, once completed, was endorsed by the OAU in 2003 (and later the AU). The African Model Law is a so-called *sui generis* alternative to the TRIPs system, as well as a broader policy governing the exchange and protection of biodiversity that is more ambitious than any international agreements regarding patents and GEOs (Adeniji, p.3). The core principles of the law are farmers’ rights as equivalent to breeders’ rights, food security, community rights, and participatory decision-making (Zerbe, pp.188-90). The Model Law

both establishes a common African position on biodiversity and “acknowledges seed security as the foundation for food security” (Adeniji, p.6). The African Union is encouraging members to negotiate and adopt a common African convention on Biological Diversity based on the African Model Law (Adeniji, p.3).

There are also a variety of international efforts to address the need for regulations regarding biosafety, and African individuals and states have played an important role in the process. The Convention on Biological Diversity (CBD) is an international treaty adopted in Nairobi in 1992 and though it addresses biodiversity, sustainability and benefit sharing of genetic resources, it does not distinguish GEOs as worthy of more careful assessment than traditionally-bred organisms (Andree, p.117). An important individual actor is Ethiopia’s Egziabher who was on a United Nations Environment Programme (UNEP) expert biosafety panel at the time and later became the chief spokesperson for Africa and the South as well as the most outspoken critic of GEOs during the discussions for the Cartagena Protocol on Biosafety of 2000 (CPB or the Biosafety Protocol) (Andree, p.117). The Biosafety Protocol is based on the precautionary principle and addresses the potential risks to biodiversity posed by GEOs, establishing a procedure to ensure that countries have access to key information for making informed decisions before agreeing to grow or import GEOs (Taylor, p.265). During the drafting process in the mid-90s the Africa Group was the first with a complete draft text and it was soon followed by other countries in the South (Andree, pp.133-134). These drafts had in common an active interest in protecting the local environments as well as the smallholder agricultural systems (Andree, p.134). The African draft also called for clear labeling of GE food (which the US does not do) as well as liability falling on “states of origin” for any health and environmental damage as a result of GE field tests or commercial crops (Andree, p.138). By framing the issue within a risk discourse “implying the eventual realization of benefits from GMOs once risks were managed” rather than a moratorium or ban (as the EU has pursued), the African draft contributed to a precautionary position that was more easily accepted internationally (Andree, p.141). As of 2005, over 130 countries had ratified the Biosafety Protocol, including 28 African countries, and excluding the US (Andree, p.3; Grebmer and Omamo, p.74). UNEP has provided capacity building assistance in a number of African states so that they can meet the requirements of the Biosafety Protocol and create their own National Biosafety Frameworks so that, if they choose, they may begin safe field trials (Taylor, p.269).

### **Systemic, External and Internal Obstacles**

With Africa largely pursuing precautionary policies on the GEO issue, it is unsurprising that states are butting heads with the major players in the international economy; notably the International Financial Institutions (IFIs) and multinational biotech companies. While developing seeds for Africa’s domestic markets has not yet been a major initiative by MNCs, sub-Saharan African states play important roles as cash crop exporters and as a market for subsidized GE food aid. Refusals by these countries to grow or import GE food undermines this cozy relationship. Even those that do wish to grow GE crops commercially are blocked from export markets or low-balled due to the structure of the current trading system and the agricultural subsidies of industrialized countries (Grebmer and Omamo, p.196). Economic and structural adjustment agreements with IFIs often push farmers to switch from domestic food production to cash crops, aggravating food insecurity and increasing dependency (Zerbe, p.154). In Zimbabwe this has led to the virtual collapse of the maize seed networks because of rising costs for smallholder farms and budget cutbacks affecting the state’s role in the networks (Zerbe, pp.122,160).

Powerful biotech MNCs want to spread their monopoly on seeds to African countries and have gone to various “charitable” measures to do so. Monsanto is collaborating with researchers in both Egypt and Kenya, for field trials in Bt cotton and sweet potato respectively (Taylor, p.268). Kenya accepted the trials which entailed the training of eight Kenyan scientists, and the signing of a royalty-free licensing agreement that allows Kenya to develop and transfer the crop technology to any other African countries (Taylor, pp.267-268). While this undoubtedly has economic benefits for Kenya, it raises concern that

multinationals are “buying their way in” to reluctant African states. This is also a concern with Monsanto’s “Seed of Hope” campaign in the ‘90s to distribute Combi-Packs containing hybrid maize seed, fertilizer, herbicide and pictogram instructions to smallholder farms in rural sub-Saharan countries (African Center for Biosafety, 2007, pp.2-3). It has been criticized for benefiting the herbicide and fertilizer producers while providing little gain to farmers, as well as being a “precursor” to the introduction of Monsanto’s GE maize (African Center for Biosafety, p.3).

State-actors are also significant external obstacles for African GEO regulation. While the diverging policy stances on GEOs in the US and the EU may provide a wider spectrum of choice to developing nations, the big powers also have various incentives to pressure smaller nations over to their side on the debate. A number of African countries have faced this dilemma of external influence, which impacts the scientific worth, domestic legitimacy, and independence of the policies adopted. The US first compromised the ability of African nations and individuals to choose whether they wanted GEOs in their borders by sending unlabeled GE food aid to countries which had not yet put in place biosafety regulations. After the group of Southern African nations rejected US food aid containing GE maize in 2002, the US told developing nations that it would thereafter link its foreign aid to a nation’s policy on GE foods (Taylor, p.18). The US Trade and Development Act is also trying to open up the African markets for biotechnology by offering preferential US market access to states that commit to maintaining and enforcing their IPRs (Zerbe, pp.89-90). Conversely, African nations may feel trapped from pursuing potentially beneficial GEO technologies due to donor and trading constraints from Europe, though the precautionary principle can at least be reversed after later deliberation, unlike the permissive US approach. Because many African states and regional blocs have the EU or countries within it as major trading partners, the decision not to grow GE crops or accept GE food aid has been seen by some as less of a genuine concern for smallholder farmers and biosafety worries, but rather a fear of losing markets in GM-Free EU countries. It is noteworthy that this view of African decision-making on GEOs does not hold true if one looks at South Africa, whose main trading partner is still the EU despite a history of producing GE crops (Grebmer and Omamo, p.196). However, there is certainly pressure from Europe, to the extent that some “key bilateral donors have made precautionary policies a precondition for assistance” (Paarlberg, p.63). European donors have also worked hard to help African states draft their biosafety standards, yet at the same time donors have invested much less in developing the technical and administrative capacity to carry out those strict biosafety standards properly (Paarlberg, p.154-155).

Finally, there are obstacles facing the ability of African states to approach the GEO issue in a cautious and comprehensive way that reside in the states themselves and in their relations to one another. The first problem is a lack of awareness of both the potential gains and risks of biotechnology in many sub-Saharan countries, which is partly why some still lack national biosafety frameworks (Grebmer and Omamo, p.26). Because of commercial confidentiality, the technical/complicated nature of GEOs, and costs of educating the public, only about 20 per cent of the sub-Saharan population know what GEOs are, making mobilization of those most directly affected very hard (Grebmer and Omamo, pp.26-29). Zimbabwe and South Africa are exceptional in their promotion of public awareness, through GEO-related public notices, workshops, seminars, and radio and TV discussions (Grebmer and Omamo, p.27). A second obstacle is that, with the exception of South Africa, even once sub-Saharan states adopt extensive biosafety regulations they largely lack the scientific, economic and institutional capacity needed “to perform a complete risk assessment” of GEOs case-by-case (Grebmer and Omamo, pp.87,215). This low capacity affects things like efficient border monitoring and proposal evaluation, and limited resources restrict both the ability to enforce regulations and to pursue research and experimentation on the potential for crop development, GE or traditional, to meet local needs (Taylor, p.265). In the past, non-GEO initiatives have shown success in decreasing poverty and malnutrition when they were designed to suit local needs, were well-managed and had political, institutional and economic support (Grebmer and Omamo, p.218). This demonstrates that food insecurity has many causes, and it is unlikely that GEO seeds alone will be enough to resolve them. A final obstacle on the African continent is the need for states to establish a consensus on GEO and IPR regulation with their neighbours. Regional and sub-regional organizations, like the AU and SADC, are good vehicles for promoting cooperation and can push states to



adopt similar policies and combine their resources towards cross-border enforcement or local research and development.

## Conclusion

GE crops and their potential impact on food security for sub-Saharan African states is a very complex issue. There are ethical, political, scientific and economic dimensions that often contradict each other and it is no wonder that there have been such divergent responses worldwide on how to regulate GEOs. The largely precautionary approach by African states reflects the recognition that the introduction of GE crops entails a number of foreseeable and unknown risks for the environment, the smallholder farming structure and individual farmers/consumers. States like Kenya, Zimbabwe and Ethiopia established national biosafety regulations early to ensure that there was not an uncontrolled introduction of GE crops into their countries. The group of Southern African states that rejected GE food aid used their strength in numbers to raise continental and international awareness of the problems GEOs pose to developing nations, as well as the need for all countries to have regulations addressing biosafety. African nations have also played important roles internationally in the Cartagena Protocol on Biosafety, and have challenged US-supported TRIPs with the ambitious African Model Law to protect indigenous knowledge and farmers' rights. At the same time, many sub-Saharan states recognize that there are clear benefits to developing crops that harbour locally-desired traits, such as drought and heat resistance, and so do not want to distance themselves from the technology entirely. South Africa has taken the lead in showing that, when regulations are properly enforced, growing GE crops on a commercial level can be profitable and safe. Regardless of whether African countries choose to restrict or permit GEOs, they all face a number of obstacles to effectively doing so. Pressure from IFIs, MNCs, donors and trading partners all play into the decisions that are made by states, and their domestic capacity and resource challenges make it hard for written regulations to become a reality. GE crops are not the solution to food insecurity in themselves, nor are they necessarily an aggravation of it, yet, because once the seeds are planted there is "no going back", the majority of African states are not willing to take any chances.

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The work of famous UK graffiti artist Banksy

# **Lost in Legal Limbo: The Case of Palestinian Refugees**

Mohammed (Mo) Al Mehairbi

One of the greatest current threats to global peace and stability is the failure of the international community to resolve the Israeli-Palestinian conflict, to which many acts of terrorism and sources of regional instability can be attributed. The ‘right of return’ of Palestinian refugees has been a perpetual deal-breaker in repeated historical attempts to negotiate an end to this conflict. The recent revival of negotiations in Annapolis, USA, and the more recent efforts of the US President on his tour of the Middle East, no doubt encountered this obstacle once more. Avoiding or postponing this particular issue is fruitless. Agreement on less controversial points, while potentially building trust in negotiating partners, is irrelevant if agreement cannot be reached on this contentious issue. This paper will clarify the unique nature of the Palestinian refugees, and will demonstrate that while the full individual right to return is not feasible, a restructuring of Palestinian demands as a collective right to return, combined with elements of compensation, and amendments to the UNHCR, could constitute significant progress towards protecting the rights of those refugees, and perhaps forming the basis for a peace agreement.

In order to clarify this, this paper will provide a definition of ‘refugee’, and establish that displaced Palestinians do legally fit that definition. A historical description of legal and political developments will then demonstrate exactly why this group, and only this group of refugees, has been specifically excluded from the rights and protections afforded to all other refugees across the world, under the Office of the United Nations High Commissioner for Refugees (UNHCR). Some possible resolutions to the dilemma will be evaluated, in order to clarify some of the more significant obstacles to agreement and thus to identify the most feasible solutions. Finally, in conclusion, this issue shall be situated in the larger discussion of the resolution of the Israel/Palestine conflict.

## **Establishing the status of displaced Palestinian as ‘Refugees’**

The 1951 Convention on Refugees and the 1967 Refugee Protocol identifies the now universally accepted definition of “refugee” as:

[Any] person who . . . as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>1</sup>

Working with this definition, the UNHCR attempts to protect refugees on two levels. On a local level, specific violations of human rights are addressed. On an international level, attempts are made to promote agreements for refugee protection, to supervise and monitor compliance with those agreements, and to work with governments in order to resettle refugees in their home country, the host country or a third state.<sup>2</sup>

The displacement of Palestinians began primarily in 1948 and was due to the single most common cause of mass migration: conflict. Violence between Palestinian communities and increasing numbers of Jewish immigrants had been steadily increasing throughout the 1930s and 1940s.<sup>3</sup> The conflict reached a crescendo with the proclamation of the creation of the State of Israel in May 1948. By the early part of 1948, the distinction between combatants and non-combatants had all but disappeared. Both Arab and Israeli fighters committed distressing atrocities such as the mass killings of civilians.<sup>4</sup> Higher Commanders appear not to have overtly sanctioned these acts, but there were few attempts to restrain the intense passion of combatants on both sides.

By April 1948, Israeli forces had established a dominant, but insecure position, and pockets of Arab resistance continued in most urban centres. The Israeli response was ‘Plan Dalet’, known as ‘Plan

D'.<sup>5</sup> Orders were given to surgically remove resistance from the Jewish State. If Israeli forces encountered any opposition in a town or village, their orders were to eliminate the immediate threat and then remove any possible threat, often the entire local Palestinian population, from Israel. News spread, and Palestinian civilians often fled from villages upon hearing of Israeli military approach. In less than a year approximately 750,000 Palestinians were expelled from Israeli territory (although official Israeli government sources suggest a figure closer to 520,000, and Arab sources around 1,000,000).<sup>6</sup> The consequences of this policy can legitimately be described as the systematic ethnic cleansing of the state.

However, Plan D should be qualified; this was a purely military set of orders, established in effect as a standard response to attacks by Palestinians. No record exists of an explicit Israeli Cabinet decision to forcibly transfer all Palestinians from Israel.<sup>7</sup> There is evidence that the exodus was driven in many cases by fear, if not actually by direct force. Exaggerating this evidence, the Israeli government and academics primarily within Israel and the US insisted for decades afterwards that the vast majority of the exodus had been voluntary, although that notion has since been reliably dismissed as pure fiction.<sup>8</sup>

The removal of Palestinians, and corresponding transfer of the Jewish population, was perceived as an essential element of the creation of a viable Israeli state. The resistance of the Arab population to the idea that their land had been presented as a gift to the Jewish people from the international community, was unambiguous and likely to continue for many years. In May 1944, David Ben-Gurion had stated that:

Zionism is a transfer of the Jews. Regarding the transfer of the Arabs this is much easier than any other transfer. There are Arab states in the vicinity...and it is clear that if the Arabs are removed [to these states] this will improve their condition and not the contrary.<sup>9</sup>

It seems unlikely that generations of Palestinian refugees would accept this rather optimistic view of events.

While the circumstances of the initial exodus were initially disputed, there is less ambiguity surrounding Israeli policy on the return of refugees. After the large scale migration in early 1948, many Palestinians found it necessary to endeavour to return to their lands in the spring, to attempt to harvest their crops, water plants or to retrieve their property from homes fled in haste.<sup>10</sup> In response, in June 1948 the Israeli government officially barred the return of any Palestinian, authorising the military to open fire on any who attempted to do so.<sup>11</sup> Security reasons were cited as justification, with varying degrees of legitimacy. The Israeli government soon established other formal policies preventing any return. For example, the 1952 Nationality Law stated that Arabs could not become Israeli citizens by returning to Israel. By somewhat circular arguments, they could only become citizens if they were residents of Israel on 1 March 1952, had proof of birth in Israel (note Israel, not pre-Israel Palestine), or had been naturalised.<sup>12</sup> This neatly removed any domestically legal possibility for displaced Palestinians to return.

The refugee situation was exacerbated further almost two decades after Israel was formed. Immediately following the 1967 War in which Israel occupied the Palestinian territories of Gaza and the West Bank, a formal census was rapidly conducted.<sup>13</sup> Only those who were at home when the census was taken were registered as being residents. Any others, such as those who had fled the fighting, or were outside Israel for a range of reasons, such as studying abroad, or visiting relatives who were removed from Israel twenty years earlier, were classified as "foreign residents", and permanently forbidden from re-entering the country. In total, approximately 320,000 additional Palestinians were removed, or prevented from returning as a result of the 1967 war.<sup>14</sup>

The forced removal of Palestinians has continued until now, albeit sporadically, and at a more gradual pace. Deportations are a frequent punishment for those suspected of activities that threaten the security of the state, but for whom insufficient evidence exists for a formal conviction. For example, in 1992, in response to the kidnapping and killing of one Israeli soldier, 412 Palestinians were forcibly expelled to Lebanon.<sup>15</sup> Palestinians are also deported for other, seemingly bureaucratic reasons; in 1980, the Jerusalem was formally expanded to include many Palestinians in East Jerusalem, who were then formally categorised as 'permanent residents of Israel'.<sup>16</sup> This category, which includes all foreign

citizens who work and live in Israel, frames residence as a privilege, and not a right, allowing Israeli authorities to revoke that status and deport them at any time. For example, if a person in this category works or lives outside Jerusalem for more than seven years, for example in the West Bank, for reasons of employment or marriage, their citizenship is revoked.<sup>17</sup> The result of this consistent policy was the continuous forced expulsion of Palestinians from the new state of Israel.

Overall, this historical and contemporary sequence of events clarifies the fact that displaced Palestinians unquestionably qualify as refugees. For the 4.4 million Palestinian refugees<sup>18</sup> in Lebanon, Syria and Jordan, there exists a “well-founded fear of being persecuted,”<sup>19</sup> and they are unable to avail themselves of the protection of the government of their own state. This then raises a fundamental question, namely why the Palestinian refugees are not protected under international laws provided for refugees.

### **The Protection Gap**

Despite the seemingly unambiguous status of displaced Palestinians as refugees, they are excluded from the 1951 Geneva Convention on the status of refugees. The reasons for this are not overtly malicious. In December 1948, the UN General Assembly was aware that the ‘two state’ solution they had approved the previous year, was, to put it mildly, not working. In response, a UN Conciliation Commission for Palestine (UNCCP) was established by the UNGA in order to “take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between,” Israelis and Palestinians.<sup>20</sup> Among other ambitious and idealistic goals, under Resolution 194, paragraph 11, the Commission was instructed to ensure that:

The refugees wishing to return to their homes and live in peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property.<sup>21</sup>

This quote has frequently been cited by Palestinians claiming that the 1952 Nationality Law discussed above was illegal under international law, and has been used as the foundation for claims of the right of return for all Palestinians. In addition to its instructions to attempt to resolve the conflict, the UNCCP was also given a protective mandate, to ensure that the civil and international rights of Palestinian refugees were protected wherever they were.<sup>22</sup>

The following year, in response to the continued plight of the Palestinians, the UNGA agreed to create the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNWRA) in resolution 302 (IV) of 8 December 1949.<sup>23</sup> As the name suggests, the primary mandate of this agency was to coordinate temporary aid relief until the situation could be resolved. It was widely believed that the organisation, which still operates today, would only be required for a short time.<sup>24</sup>

Therefore, in 1951, when the Geneva Convention on the status of refugees was agreed to in the UNGA, the Palestinian situation was already being addressed in a comprehensive, if unsuccessful manner by the UNWRA and UNCCP. Thus, perhaps for reasons of coordination, and the desire not to establish agencies with overlapping mandates, it was decided (in Article 1D) that:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.<sup>25</sup>

In order to reiterate this for anyone who may skim-reading the document, and miss the significance, the recent publication of the Convention and Protocol includes on the first page of the introduction the

comment that, “The Convention does not apply to those refugees who are the concern of United Nations agencies other than UNHCR, *such as refugees from Palestine* [emphasis added] who receive protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).”<sup>26</sup> The document identifies no other group for exclusion from the Convention. With Article 1D, the Palestinians were suddenly excluded from the legal international protection afforded all other refugees, such as, for example, those forcibly removed from their homes by German forces during World War II. Only in the event that the UNCCP and UNWRA ceased to assist the Palestinians, would they then fall under the mandate of the UNHCR.

There are numerous possible reasons for the exclusion of the Palestinians from the UNHCR. It could be argued that the Palestinian issue was considered to be so severe and urgent as to require specific and undivided attention from its own protection regime.<sup>27</sup> Many authors seem to imply that the UNGA was trying to make amends for a sense of collective guilt, having contributed to the crisis in 1947 by recommending the partition of Israel and the withdrawal of British troops in Resolution 181.<sup>28</sup> Overall, there seems to have been a powerful concern, articulated by Arab as well as Western states, that “including Palestinians into general refugee protection policy would actually award them ‘less protection than they deserved’,” and thus they should not be subsumed under the UNHCR.<sup>29</sup> Another possible reason was that in addition to the Palestinian situation being considered extremely severe, it was also unique. Not only were refugees unable to return to their own country for reasons of safety, but they were being formally refused re-entry by the legitimate government of a UN member state.<sup>30</sup> A combination of these reasons probably contributed towards the decision to exclude Palestinians from the UNHCR, motivated by concerns that seem predominantly pragmatic and benevolent.

Some have argued that the emphasis within refugee law after World War II was not on repatriation, but on resettlement, and the protection of the rights of refugees.<sup>31</sup> This could conceivably have been encouraged by the fact that many persecuted minorities who had been forced to leave homes in Germany did not wish to return there. International law as it developed would respond to their situation by emphasising that the governments of the states in which they later found themselves must allow them to stay. Unfortunately, the case in Israel was different, and this emphasis was ineffective. The majority of Palestinians had no interest in resettlement elsewhere, and insisted on the unequivocal right of repatriation above all other concerns. Therefore, a different approach, outside the UNHCR, would be necessary.<sup>32</sup> Nevertheless, regardless of the specific reasons for the Palestinians’ exclusion from the protection of the UNHCR, the consequences have been devastating, because “the convention’s protections are far-reaching and extensive,” including rights not to be expelled from a country without due cause, to freedom of movement, to “economic and social rights such as employment, labor legislation, and social security,” that, if adhered to, could have spared the Palestinian population a great deal of suffering.<sup>33</sup> The reasons for this suffering stem from the inability of the dedicated UN organisations to achieve the goals set before them.

### **The UNCCP and UNWRA**

This regime would have afforded Palestinian refugees the relief and protection they required, were it not for significant failings on the part of both the UNCCP and UNWRA. The UNCCP, in its role as an advocate for negotiations for the return of refugees, rapidly ground to a halt. In the summer of 1949, the chief US delegate to the UNCCP convinced President Harry Truman that any progress was extremely unlikely.<sup>34</sup> The result was an Economic Survey Mission that concluded that, with no end in sight to the issues of repatriation or compensation, immediate relief aid should be given to the displaced Palestinians. This conclusion was instrumental in the creation of the UNWRA in December, 1949.

A year after its creation, the fact that UNWRA would have to adopt some of the objectives of UNCCP became apparent to the UN General Assembly, and Resolution 393 added to the mandate of UNWRA, emphasising attempts at re-settlement, with the ultimate goal being the removal of Palestinians from relief programs.<sup>35</sup> In this capacity, the UNWRA achieved negligible success. On one occasion, the Israeli government offered a limited repatriation of 100,000 refugees, but then withdrew the offer in 1951.<sup>36</sup> From that point onwards, the unambiguous refusal of the Israeli government to consider

accepting any Palestinians led to the atrophy of the UNCCP. By 1952 “the only aspect of the broad range of the UNCCP’s protection activities that remained was gathering information on refugee property in Israel and investigating the possibilities of compensation”.<sup>37</sup>

With the UNCCP no longer effectively protecting Palestinian refugees, and the UNHCR specifically instructed not to intervene, the only organisation directly invested in the lives of the refugees was the UNWRA. However, the UNWRA was designed simply as a method to provide development assistance, and was unable to successfully extend its own mandate.<sup>38</sup> This mandate, which involves education, aid, social services and microfinance enterprises, is supported purely by voluntary contributions by UN members. The contributions have unfortunately “failed to keep pace with the rate of natural growth of the refugee population,” and the organisation as a whole suffers from a severe lack of resources.<sup>39</sup> UNWRA reports from 1954 and 1955 indicate that resettlement efforts had not been implemented “for lack of real international assistance, inadequate physical resources, and rejection by refugees lest these programs should “prejudice their rights to repatriation or compensation””.<sup>40</sup>

Attempts have certainly been made by the organisation to extend its operations to include some protection of refugees during conflict. These ambitions were formalised with the hiring of a dedicated Protection Officer in 2005, but legal constraints and lack of resources have hampered these efforts.<sup>41</sup> UNWRA currently states that the organisation “provides a measure of protection to Palestinian refugees in its area of operation,” however, that protection is often limited to the threat of increasing public awareness of specific rights violations.<sup>42</sup> Furthermore, the organisation’s attempts to establish lasting economic development amongst Palestinian refugees has been hampered by a lack of support from Arab countries, including host states, “because refugees and Arab governments viewed them as slightly disguised peacemaking efforts directed towards de facto resettlement.”<sup>43</sup> This lack of support will be discussed in more detail below, in the context of the possible solutions to the refugee situation.

## Solutions

The three apparent possible solutions to any refugee situation, cited by all UN bodies discussed in this paper, are i) “voluntary repatriation and reintegration to their homeland in safety and dignity,” ii) “integration in their countries of asylum,” and iii) resettlement in third countries.<sup>44</sup> Of these, “UNHCR considers voluntary repatriation to be the most appropriate.”<sup>45</sup> While many authors claim that in “the case of the Palestinians, the largest single refugee group, none of these options is available,”<sup>46</sup> this paper will assess their feasibility, in order to determine whether, with modifications, any of these three options, or additional possibilities such as compensation or changes to the UNHCR, could be practicable.

### 1) Voluntary repatriation to Israel

The ideal solution to any refugee problem is a safe return to their place of origin. The UN General Assembly made many attempts to insist that Israel allow repatriation, such as Resolutions 194, 237 and 242, and their annual reaffirmation. No significant success has yet been made.

From the Palestinian perspective, the right of return is simply that, an inalienable *right*, internationally legitimised by paragraph 11 of the UNGA Resolution 194 quoted above. The PLO has, for decades, conceptually equated liberation with the right of Palestinians to return to the original site of their families’ homes. This right is viewed as inseparable from the two other unalterable political objectives, self-determination and the establishment of a Palestinian state.<sup>47</sup> However, the intractable position of the Israeli government against large scale repatriation is “certain, written into law by Knesset vote and reasserted in every forum and by all political tendencies.”<sup>48</sup>

The most obvious reason for this objection is a combination of demography and democracy. The population of Israel is 7.2 million, but only 5.45 million are categorised by the Israeli government as Jews.<sup>49</sup> Most of the remainder are Arabs. In the unlikely hypothetical situation that all 4.4 million<sup>50</sup> Palestinian refugees returned to Israel, the Jewish population would then actually become a minority group in Israel, and Arabs would constitute a slight majority. If the Israeli government was a dictatorship, this might not present an immediate problem, but as the Israeli government website proudly declares:



Israel has an electoral system based on nation-wide proportional representation. Unlike most of the Western parliamentary democracies, the system in Israel is followed in an extreme manner and the only limitation on a list being elected is that it should pass the qualifying threshold, which is currently 2%.<sup>51</sup>

The consequence of the proportional representation system is that, even if many Palestinians did not return (it is highly unlikely that *all* would return), and Israelis remained the majority, Palestinians would still be able to elect many of their own representatives into government positions. This is, unfortunately, unthinkable for most Israelis. The 'right of return' effectively constitutes a fundamentally existential threat to the state of Israel, potentially rendering meaningless their historical struggle to reclaim the land that, it is believed, was given to them by God.

The only plausible way to restructure this issue in such a way as to make it more palatable for the Israeli government would be for the demand for a return to be reframed by the Palestinian negotiators as a *collective* right to return for all Palestinians to the area that would constitute a new Palestinian state, *rather than the individual right of return* for each to his specific historical place of ancestral residence.<sup>52</sup> This would reassure Israelis that their country, as defined by any newly agreed borders, would continue to be governed by Israelis. During the Oslo Accords concluded in 1993, Shimon Peres insisted that any claims to return must be made on this collective basis, indicating that this was an area on which potential agreement could be reached.<sup>53</sup>

## 2) Host country absorption

As large scale repatriation, particularly on an individual, rather than collective basis, is thus unlikely, some attempts have naturally been made to resettle Palestinian refugees elsewhere, with current host countries being an apparently strategic choice. Within the Arab world, this is referred to as *tawtin*, or "implantation". There are, unfortunately, significant obstacles to this strategy. Many Arab states initially offered "refuge and protection based on the assumption that the refugees' stay would be temporary and that some kind of solution would be found by the Palestine Conciliation Commission,"<sup>54</sup> and long ago reached "a consensus that absorption or resettlement of the Palestinians within Arab territories (or elsewhere) would undermine the demand for the refugee's return".<sup>55</sup> Within Lebanon, one of the primary host states, opposition to their settlement within that state is one of the few issues that unite the Lebanese government and public opinion.<sup>56</sup> By maintaining the status of the Palestinians as refugees, and not merely migrants, it was felt that more international pressure would continue to be brought upon the Israeli government to accept responsibility for the initial and later forced migrations.<sup>57</sup> Both legitimate and illegal organisations within the Occupied Territories hold similar views. For example, the Palestine Liberation Organisation (PLO) has "made explicit requests [for refugees] not to apply for refugee status in the West."<sup>58</sup>

The stance of the host Arab states would be less worrying if it was limited to the mere refusal of formal citizenship for Palestinian refugees. Unfortunately, it is not. In most UNWRA Arab states the legal status of Palestinians remains deliberately obscure, and various Gulf States, "have expanded or contracted the rights accorded to Palestinians in keeping primarily with their need for Palestinians as skilled workers and professionals".<sup>59</sup> With the exception of those hosted in Jordan, refugees cannot become citizens or gain secure residency rights, despite having now lived within the borders of those host states for generations.<sup>60</sup> The extremity to which integration is resisted has led to terrible conditions in some host countries, such as constraints on space and shelter, refusal of civic rights, restriction of freedom of movement (both nationally and internationally), and the reduction in numbers of those with residency rights.<sup>61</sup> The result of these policies would be "outright starvation were it not for 'the institutions'- that carapace formed by the UNWRA, the local NGOs, and the Islamic groups," that barely provide enough for survival.<sup>62</sup>

### 3) Third country resettlement

The option for resettlement elsewhere faces similar obstacles to host country absorption, in that many vested interests insist on maintaining the status quo as a means of maintaining the moral 'high ground', demanding repatriation as the *only* viable solution. There is also some resistance from potential hosts. A literal reading of the 1951 Convention on Refugees' definition can be problematic; that document states that the person or group, being motivated by the "fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is *outside the country of his nationality* [emphasis added]." <sup>63</sup> As Palestinians in exile have never actually been citizens of the state of Israel, they are assessed according to their fear of persecution within their last residence, usually a UNWRA operated camp in a host state. Unless they can prove that the UNWRA was attempting to assassinate them, which presumably would not be possible, they have no legal basis for being accepted as refugees. <sup>64</sup> This is, however, not a universal interpretation of the Article. Fortunately, some states such as Canada have permitted some Palestinian immigration. This example highlights the urgent need for clarification of the legal status of exiled Palestinians as refugees, in order to increase both the normative and legal pressure on third party states to seek a resolution, either to the broader conflict, or to the specific issue of refugees.

### 4) Compensation

Another possibility would be compensation for refugees, again under paragraph 11, Resolution 194 quoted above. While the precise wording specifies compensation for those who voluntarily do not wish to return, agreement may be reached on reasonable compensation that would encourage refugees to accept, and be given the opportunity to improve their living conditions. There are many refugee, "law principles and precedents [that] include the right to claim restitution of property and/or compensation for losses caused by the refugee-producing state." <sup>65</sup>

However, similar difficulties to those discussed above arise. In the past, the formal position of the Israel government has included offers of compensation; unfortunately, they have insisted that this compensation be conditional on parallel compensation for all property lost by Jewish people who left Arab countries to migrate to Israel. <sup>66</sup> As few reliable records exist of this property, and as the Jewish Diaspora came from many different countries in the Arab world, the Palestinian negotiators have refused, stating that the Palestinians are not responsible for Israeli migration from other Arab countries. While arguably justifiable on these legal grounds, this refusal might also be based on a likely outcome of vastly diminished compensation if this form of reciprocation were included.

Palestinian activists tend to be inflexible on this issue. In March, 2000, the National Committee for the Defence of the Rights of the Internally Displaced issued the following statement after a rally in Nazareth:

We absolutely do not accept or recognise any outcome of negotiations that may lead to an agreement that forfeits any part of the Right of the Return of the refugees and the displaced to their homes from where they were expelled in 1948 or their due compensation – and *we do not accept compensation as a substitute for return* [emphasis added]. <sup>67</sup>

This position is fairly uniform amongst the various Palestinian organisations. Even under circumstances where negotiators rationally develop a more flexible approach on the issue, they are aware that an agreement will be worthless if they are unable to persuade activists within the Palestinian population, and the vast majority of Palestinians would probably reject any such concessions. <sup>68</sup>

### 5) Amend UNHCR

The final possibility would be a seemingly simple amendment to the 1951 Convention, formally including Palestinian refugees within its protection. The legal basis for such a move would be easy to argue. Article 1D of the 1951 Convention above stated that, for groups protected by UNWRA and UNCCP, when "such protection or assistance has ceased for any reason...these persons shall *ipso facto* be

entitled to the benefits of this Convention.”<sup>69</sup> It can certainly be argued that the protection of UNCCP has ceased, if it ever in fact existed.

An alternative suggestion to UNHCR change, with a similar outcome, would be the formal expansion of the mandate of the UNWRA to include the ability to provide international legal protection for the rights of Palestinian refugees.<sup>70</sup> This might be acceptable, but given the historical depth of expertise in the specific, different mandates of the UNWRA and the UNHCR, it would be more logical to allow each organisation to continue to fulfill the functions they were designed to perform.<sup>71</sup>

The familiar pattern of objections continues with this option. As one would expect, Israel would object to such a change, as it would then be obliged under international law to provide many basic civil rights to Palestinians within the West Bank and Gaza, which are currently being denied. However, some of the strongest objections originate with host UNRWA countries, who “have requested UNHCR to enter into a memorandum of understanding stipulating that will under no circumstances exercise any mandate towards Palestinians residing in their territories”.<sup>72</sup> The reasoning is that they would then have to provide those civil goods, residency rights and services to Palestinians within their territory, thus further weakening their claim that the desperate plight of the Palestinians is the sole responsibility of the Israeli government, and that repatriation is the only option.

### Concluding Remarks

This paper has sought to clarify the status of displaced Palestinians, and has identified their peculiar location within an unusual vacuum within the framework of international law. A consequence of this legal vulnerability of the Palestinian refugees has been the inability of the international community to prevent, “torture, collective punishment, severe limitations on freedom of movement and political expression, the continuing appropriation of land, property and resources in violation of the Fourth Geneva Convention, targeted assassinations (i.e. extrajudicial executions), willful killings, home demolitions and ethnic cleansing.”<sup>73</sup> The obstacles to resettlement and repatriation, within Israel, the Palestinian population, Arab countries and the wider international community, must be addressed rationally, compassionately, and in accordance with international law. However, while many of the relevant actors and potentially supportive influences extend beyond the Middle East, a solution cannot be imposed, and must be generated internally. As a group whose very cultural and religious identity is rooted in its experience as a Diaspora, the Jewish population of Israel should be able to empathise with the current situation of the displaced Palestinians, and thus able to understand the passion with which the Palestinians seek to return to their home. This mutual empathy might hopefully form the basis of a lasting solution to the plight of the Palestinian refugees, and to the Israeli-Palestinian conflict.

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<sup>1</sup> UNHCR. Convention and Protocol on the Status of Refugees (UNHCR, 2007): Article 1A.2.

<sup>2</sup> Susan M. Akram. “Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution” *Journal of Palestinian Studies*. 31.3 (Spring 2002): 37-38.

<sup>3</sup> Helena Lindholm Schulz and Juliane Hammer. *The Palestinian Diaspora*. (London: Routledge, 2003) 25.

<sup>4</sup> Schulz, 28.

<sup>5</sup> *Ibid.*, 29.

<sup>6</sup> Nell Gabaim. “Negotiating Rights: Palestinian Refugees and the Protection Gap.” *Anthropological Quarterly*. 79.4 (Fall 2006): 718.

<sup>7</sup> *Ibid.*, 32-33.

<sup>8</sup> Elia Zureik. “Palestinian Refugees and Peace.” *Journal of Palestinian Studies*. 24.1 (Autumn, 1994): 10.

<sup>9</sup> *Ibid.*, 31.

<sup>10</sup> Schulz, 33.

<sup>11</sup> *Ibid.*, 34.

<sup>12</sup> Zureik, 12.

<sup>13</sup> Schulz, 39.

<sup>14</sup> *Ibid.*, 39.

<sup>15</sup> *Ibid.*, 41.

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- <sup>16</sup> Ibid.
- <sup>17</sup> Ibid.
- <sup>18</sup> UNRWA, 2006, 9.
- <sup>19</sup> UNHCR 1951 Convention, Article 1A.2.
- <sup>20</sup> UNGA Resolution 194 (III) (11 December, 1948) para 6.  
<<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/043/65/IMG/NR004365.pdf?OpenElement>>
- <sup>21</sup> Ibid., para 11.
- <sup>22</sup> Akram, 38.
- <sup>23</sup> UNGA Resolution 302 (IV) (8 December 1949) para 7.  
<<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/051/21/IMG/NR005121.pdf?OpenElement>>
- <sup>24</sup> UNWRA. The United Nations and Palestinian Refugees. (UNWRA, January 2007) 4.  
<[http://www.un.org/unrwa/publications/pubs07/UN&PR\\_en.pdf](http://www.un.org/unrwa/publications/pubs07/UN&PR_en.pdf)>
- <sup>25</sup> UNHCR Convention, Article 1D.
- <sup>26</sup> UNHCR. Convention. 5-6.
- <sup>27</sup> Akram, 40.
- <sup>28</sup> UNGA. Resolution 181 (29 November 1947) B.  
<<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/038/88/IMG/NR003888.pdf?OpenElement>>
- <sup>29</sup> Gabaim, 716.
- <sup>30</sup> Akram, 40.
- <sup>31</sup> Zureik, 8.
- <sup>32</sup> Ibid.
- <sup>33</sup> Shiblak, 37.
- <sup>34</sup> David P. Forsythe. "UNWRA, the Palestinian Refugees, and World Politics: 1949-1969." International Organisation. 25.1 (1971): 30.
- <sup>35</sup> Hassan Elnajjar. "Planned Emigration: The Palestinian Case." International Migration Review. 27.1 (Spring, 1993), 36.
- <sup>36</sup> Akram, 42.
- <sup>37</sup> Ibid.
- <sup>38</sup> Ibid., 43.
- <sup>39</sup> UNRWA UNRWA in 2006. (New York: UNWRA, 2006) 8-22.  
<[http://www.un.org/unrwa/publications/pubs07/unrwa\\_in\\_2006.pdf](http://www.un.org/unrwa/publications/pubs07/unrwa_in_2006.pdf)>
- <sup>40</sup> Elnajjar, 36.
- <sup>41</sup> Gabaim, 724.
- <sup>42</sup> UNWRA, The United Nations. 5.
- <sup>43</sup> Forsythe, 43.
- <sup>44</sup> UNWRA, The United Nations. 9.
- <sup>45</sup> Akram, 46.
- <sup>46</sup> Abbas Shiblak. "Residency Status and Civil Rights of Palestinian Refugees in Arab Countries." Journal of Palestinian Studies. 25.3 (Spring 1996): 36.
- <sup>47</sup> Schulz, 141.
- <sup>48</sup> Rosemary Sayigh. "Palestinians in Lebanon: Harsh Present, Uncertain Future." Journal of Palestinian Studies. 25.1 (Autumn, 1995) 40.
- <sup>49</sup> Israel. "Population by Group." Central Bureau of Statistics.  
<[http://www.cbs.gov.il/ts/databank/series\\_func\\_e.html?level\\_1=2&level\\_2=1&level\\_3=1](http://www.cbs.gov.il/ts/databank/series_func_e.html?level_1=2&level_2=1&level_3=1)>.
- <sup>50</sup> UNRWA, 2006, 9.
- <sup>51</sup> Israel. "The Electoral System in Israel" Israel Government Portal. (2006) 29 Nov. 2007  
<<http://israel.gov.il/FirstGov/TopNavEng/EngSubjects/EngSElections/EngSEElectoral/>>.
- <sup>52</sup> Schulz, 144.
- <sup>53</sup> Akram, 47.
- <sup>54</sup> Shiblak, 38.
- <sup>55</sup> Akram, 42.
- <sup>56</sup> Sayigh, 37.
- <sup>57</sup> Shiblak, 38-39.
- <sup>58</sup> Akram, 42.
- <sup>59</sup> Ibid., 44.

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- <sup>60</sup> Zureik, 15.  
<sup>61</sup> Sayigh, 43-44.  
<sup>62</sup> Ibid., 47.  
<sup>63</sup> UNHCR 1951 Convention, Article 1A.2.  
<sup>64</sup> Shiblak, 38.  
<sup>65</sup> Akram, 46.  
<sup>66</sup> Zureik, 13.  
<sup>67</sup> Schulz, 149.  
<sup>68</sup> Ibid., 153.  
<sup>69</sup> UNHCR 1951 Convention, Article 1D.  
<sup>70</sup> Akram, 47.  
<sup>71</sup> Ibid.  
<sup>72</sup> Akram, 45.  
<sup>73</sup> Ibid., 926.

### **Annotated Bibliography**

Akram, Susan M. "Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution" *Journal of Palestinian Studies*. 31.3 (Spring 2002): 36-51. For the purposes of this paper, this was extraordinarily useful. Of all the articles cited here, this is the most detailed and concise description of the historical evolution of legal complexities that have left the Palestinians in a unique vortex of international law. It also includes some very brief, but wise suggestions for solutions to the Palestinian refugee situation.

Elnajjar, Hassan. "Planned Emigration: The Palestinian Case." *International Migration Review*. 27.1 (Spring 1993): 34-50. The focus of this article was on efforts made by the international community and UNWRA in particular, to enable Palestinians to emigrate from refugee areas, using education, training and works programs. Of particular interest for this topic are the reasons for the broad failure of these initiatives, including the resistance of the Palestinians themselves.

Forsythe, David P. "UNWRA, the Palestinian Refugees, and World Politics: 1949-1969." *International Organisation*. 25.1 (1971): 26-45. Despite being somewhat dated, this article draws attention to the relationships between the UNWRA and relevant state actors such as the US, USSR, and Arab states. Early efforts by UNWRA to encourage economic development, and obstacles to success, are concisely documented.

Gabaim, Nell. "Negotiating Rights: Palestinian Refugees and the Protection Gap." *Anthropological Quarterly*. 79.4 (Fall 2006): 717-730. The description of the origins of the protection gap for Palestinians is slim, but this article contains an excellent analysis of the challenges and benefits of reframing demands for rights either on collective grounds, or on an individual basis.

Israel. "Population- By Population Group" Central Bureau of Statistics. (2006) 29 Nov. 2007.

<[http://www.cbs.gov.il/ts/databank/series\\_func\\_e.html?level\\_1=2&level\\_2=1&level\\_3=1](http://www.cbs.gov.il/ts/databank/series_func_e.html?level_1=2&level_2=1&level_3=1)> This site has a useful and interesting tool for comparing population changes of Jews, Arabs, and Others since the state of Israel was formed. Statistics on Arabs seem to be missing (although the link is there, so it might be temporary), but one can extrapolate using 'Total' minus 'Jews and Others' to find Arab populations.

Israel. "The Electoral System in Israel" Israel Government Portal. (2006) 29 Nov. 2007

<<http://israel.gov.il/FirstGov/TopNavEng/EngSubjects/EngSElections/EngSEElectoral/>>. This, as with all Israeli government websites, is professional, detailed, and user friendly. This page, however, as with almost all pages in the Israeli government site, has links to sites that seem somewhat unrelated to the election system, such as "Holocaust Remembrance" and "The Struggle for Independence". (Israeli independence, not Palestinian).

King-Irani, Laurie. "Exiled to a Liminal Legal Zone: are we all Palestinians now?" *Third World Quarterly*. 27.5 (2006): 923-936. King-Irani uses the Palestinian example to illustrate a series of worrying examples of the lack of international legal protection. The author situates the discussion in a theory that the 'war on terror' is threatening to weaken existing protection. The latter is certainly interesting, but not as relevant for this paper as the specific discussion of the legal status of Palestinians as state-less individuals.

Sayigh, Rosemary. "Palestinians in Lebanon: Harsh Present, Uncertain Future." *Journal of Palestinian Studies*. 25.1 (Autumn 1995): 37-53. Sayigh does an excellent job of summarizing the health, education, unemployment and migration crises that exist in Palestinian refugee camps in Lebanon. She identifies weaknesses within support agencies, in particular the inconsistent, insufficient, and uneven contributions from the international community.

Schulz, Helena Lindholm and Juliane Hammer. *The Palestinian Diaspora: Formation of identities and politics of the homeland*. London: Routledge, 2003. This text is a sociological study rather than a political one, with a strong focus

on identity formation that is fascinating, but beyond the scope of this paper. However, Chapter 2 in particular provides an excellent description of the incidents of conflict and expulsion that have caused the Palestinian refugee situation, and was indispensable.

Shiblak, Abbas. "Residency Status and Civil Rights of Palestinian Refugees in Arab Countries." *Journal of Palestinian Studies*. 25.3 (Spring 1996): 36-45. This article concisely and carefully explains the motives for the Arab host countries' resistance to any formal integration of Palestinian refugees into their respective countries. It also contains a useful summary of restrictions on specific rights of Palestinian refugees, such as freedom of movement, employment, and access to services.

UN. "Resolutions." General Assembly. <<http://www.un.org/documents/resga.htm>>. This is a truly splendid resource, and was the source of many hours of general perusal, as well as productive research. There are links to each year's resolutions, within which are lists of summary titles that make the search for resolutions on any particular subject or state relatively swift.

UNHCR. "Convention Relating to the Status of Refugees." (1951) Convention and Protocol Relating to the Status of Refugees New York: UNHCR, 2007. <<http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>>. A wonderful, idealistic document describing the definition and protections for refugees such as "non-refoulement," the concept that refugees cannot be forcibly returned to somewhere that is not safe for them. It also spells out, even on the first page of the modern added introductory note that, "The Convention does not apply to those refugees who are the concern of United Nations agencies other than UNHCR, such as refugees from Palestine"

UNRWA. UNRWA in 2006. New York: UNRWA, 2006.

<[http://www.un.org/unrwa/publications/pubs07/unrwa\\_in\\_2006.pdf](http://www.un.org/unrwa/publications/pubs07/unrwa_in_2006.pdf)>. This UN document concisely describes the efforts made by UNRWA, including education, relief and social services, and microfinance. It emphasised the vast disparity between the organisations extensive mandate, and limited resources.

UNRWA. The United Nations and Palestinian Refugees. New York: UNRWA, 2007.

<[http://www.un.org/unrwa/publications/pubs07/UN&PR\\_en.pdf](http://www.un.org/unrwa/publications/pubs07/UN&PR_en.pdf)>. If a reader had two minutes to learn as much as possible about the legal, economic, and social status of the Palestinian refugees, and what the UNRWA are trying to do to help, this is the document to read. Brief, concise, and succinct.

Zureik, Elia. "Palestinian Refugees and Peace." *Journal of Palestinian Studies*. 24.1 (Autumn 1994): 5-17.

Exceptional article that, while avoiding legal detail, does a wonderful job of highlighting some of the most significant obstacles to resolving the Palestinian refugee situation. Particular attention is paid to the motives of key state actors, and the coordination, or lack thereof, between them.



Banksy on *The Wall*

## **E. H. Carr's Realism: Science and Dialogue in International Relations Theory**

Lauren Mills

*Political Science is the science not only of what is, but of what ought to be.*

-E.H. Carr, *The Twenty Years Crisis*<sup>1</sup>

E. H. Carr is often considered part of the classical realist canon in International Relations theory. Robert Gilpin, in particular, deems him one of the three great realist writers, along with Hans Morgenthau and Thucydides.<sup>2</sup> Carr's theory of International Relations, however, is much more complex than is often assumed in the textbook version of classical realism. Carr is most often associated with his rejection of Wilsonian utopian liberalism. What many ignore, however, is that Carr also critiques realism, and in the end chooses a middle ground. As a result, Carr is often accused of being a relativist by idealists and realists alike. Through an examination of his sociology of knowledge, this essay will show how Carr's theory of International Relations can be seen as a precursor to post-positivism<sup>3</sup> and will subsequently evaluate the renewed contemporary relevance of Carr's work<sup>4</sup> in light of both old and new interpretations of his theories. This essay will also show that the relativist aspects of Carr's theory are overlooked to the extent that his dedication to realism (and by extension, positivism) as an epistemological framework is mistakenly assumed.

The discipline of International Relations had its origins in the aftermath of the First World War, when there was great impetus to study the causes of the first "total war" in global history in an effort to prevent a reoccurrence of such a conflict. During the interwar period, many of the major thinkers in the discipline were idealists, sharing in the optimism of iconic peace-time figures such as Woodrow Wilson. Convinced in 1939 that the idealists had failed in their task of preventing another war, Carr does not appear to share in this optimism.<sup>5</sup> Carr's best known work on International Relations, *The Twenty Years' Crisis*, is intended to be an introduction to the then relatively "new" discipline. Taken literally, the heading of Carr's first chapter purports to introduce the reader to the "science" of International Relations. This particular use of language, combined with Carr's famous attack on idealism, helped introduce thinkers in International Relations to what is now known as the classical realist paradigm.<sup>6</sup>

While Carr clearly states his intention to introduce International Relations as a science, it is not equally clear what he means by science. On one hand, in the chapter headings of *The Twenty Years' Crisis*,<sup>7</sup> Carr uses the word "science" as one would "discipline", to denote the establishment of something separate from other disciplines for the first time. As Carr puts it, "the science of international politics has, then, come into being in response to a popular demand."<sup>8</sup> In one of his later works, *What is History?*, Carr also associates science with the notion of rigor and critique.<sup>9</sup> This loose use of the term "science" is appropriate if we agree with the assumption that Carr's *The Twenty Years' Crisis* is a period piece, written with the goal of assuring the greater success of the next Peace Conference than was the case following Paris 1919.<sup>10</sup> According to Carr, a change in the way in which International Relations is examined is necessary. His answer is the realist critique, designed to bring rigor and maturity of thought into the discipline.

On the other hand, Carr could be trying to introduce us to a scientific theory of International Relations, where the methods with which one studies the physical sciences are applied to the social sciences. A look into Carr's sociology of knowledge proves important here. In *What is History?* Carr writes extensively on the difference between the physical and social/political sciences. While Carr wishes to show that the "aims and methods [of the social and physical sciences] are not fundamentally dissimilar,"<sup>11</sup> he makes it clear that there is a difference between the context in which both are practiced that affects the outcome of the respective study of each type of science. In the physical sciences, the purpose of study (which can be broadly constructed as "to examine the way in which the world works") can more easily be separated from the process and results of investigation, although it is still relevant. This type of thought is positivistic, where facts are associated with objective truth. The same cannot be

said for political science, according to Carr.<sup>12</sup> Facts do not speak for themselves, but are accorded valuations by the historian, and this inevitably affects our understanding of history. This is not a positivist viewpoint, as it politicizes the very nature of facts, which in the study of “science” are considered independent of valuations or opinions. Carr writes that “the Positivists, anxious to stake out their claim for history as a science, contributed the weight of their influence to this cult of facts”<sup>13</sup>. Instead of accepting positivism, Carr writes that “history is a social process”<sup>14</sup> where knowledge and language are conditioned by what people experience.

Carr’s sociology of knowledge in history applies equally to his theory of International Relations. *The Twenty Years’ Crisis* relies strongly on Karl Mannheim’s *Ideology and Utopia* for its theory of knowledge, which is rooted in historicism.<sup>15</sup> Charles Jones writes that Mannheim deserves much consideration when discussing Carr’s theory of International Relations because it was he who provided Carr with a post-positivist social scientific methodology.<sup>16</sup> J. Samuel Barkin argues that parts of Carr’s work sound like a Foucaultian critique of Wilsonian idealism, with a focus on the way in which power affects the way we see relationships in politics.<sup>17</sup> Both claims reveal the ways in which Carr’s epistemological orientation is quite relativistic in nature. Carr rejects positivism on the grounds that it does not present an accurate picture of the world. Indeed, Carr warns his readers of the two dangers facing sociology today – “the danger of becoming ultra-theoretical and the danger of becoming ultra-empirical”<sup>18</sup>. Carr opts for a balanced approach in *The Twenty Years’ Crisis*, and while providing a critique of both utopianism and realism, he contends that a successful theory of International Relations must contain elements of both. Taken individually, either extreme leaves little room for the development of sound political theory.

Carr was criticized by both idealists as well as his fellow classical realists for the relativistic aspects of his theory. Norman Angell, one of Carr’s earliest critics, argued that *The Twenty Years’ Crisis* was an attempt to justify inaction, and that Carr gave an overall impression of moral nihilism.<sup>19</sup> Angell fails to make a distinction between Carr’s epistemological relativism, which can be best explained from the post-positivist viewpoint, and instead argues on the basis of morality. This is significant because while Carr does appear to be a moral relativist, the relativist aspects of Carr’s theory are most apparent on an epistemological level. For instance, Hans Morgenthau argues that Carr’s theory fails precisely because he has no “transcendent point of view from which to view the world”<sup>20</sup>. Instead, “Mr. Carr, the realist, sets out in search of a new utopia, and all subsequent thinking becomes The Odyssey of a mind which has discovered the phenomenon of power and longs to transcend it”<sup>21</sup>. Here, Morgenthau is missing the point – Carr does not wish to transcend either morality (a world view) or power. Carr is actually arguing against the existence of objective truths or absolute frameworks from which one could view the world. For instance, Carr rejects the idealists “harmony of interest” doctrine<sup>22</sup> as well as the idea that pure realism could lead to a better world. In this way, Carr’s epistemological relativism lends itself to a version of “realism” that is firmly grounded in an ever-changing reality.

Despite Morgenthau’s objections to Carr’s epistemology, the two thinkers are both considered to be part of the classical realist tradition and do share some common ground, particularly in their emphasis on the important relationship between theory and practice. Both theorists had a strong interest in keeping their countries (the USA and Britain respectively) engaged in international politics after the Second World War, and in part, their policy prescriptions flow from this shared interest. Throughout his description of his “Six Principles of Political Realism,” Morgenthau emphasizes the role of the statesman and the role of political theory in “giving meaning to the factual raw material of foreign policy”<sup>23</sup>. Carr, similarly, puts forth a dialectic between the two notions of theory and practice, assigning characters to each action (the intellectual and the bureaucrat, respectively), and showing how both are necessary in a complete understanding of international politics.<sup>24</sup>

This dialectic between theory and practice is not the only one in Carr’s development of a theory of International Relations. Carr was not only a historian, but a specialist in Soviet history, and his Marxist influences<sup>25</sup> are obvious in *The Twenty Years’ Crisis*. His process of thought reflects the Hegelian dialectic commonly seen in Marxist works. Carr uses this thesis-antithesis approach to explain various dialectics<sup>26</sup> all related to the original typology of the utopian-realist. Combined with a post-positivist



sociology of knowledge, the dialectic method can be successfully used to introduce a new discipline of international relations and a framework by which it should be analyzed. Accordingly, Carr's realist attack on utopian thought is hardly scientific in a positivist sense. In Carr's words, "the weapon of relativity of thought must be used to demolish the utopian concept of a fixed and absolute standard by which policies and actions can be judged"<sup>27</sup>. Once again, Carr is arguing against a fixed standard of judgment in International Relations.

One could even argue that science, in a way, amounts to such a standard under the assumption that scientific method leads to truth. The development of "objective universal standards" is one criticism directed at both utopianism and realism in Carr's critique of approaches to International Relations. The utopian view confuses the two notions of appearance and reality, and forces action based on interest alone. On the other side, pure realists fail to realize that true objectivity is impossible. Aspiring to science-like precision, particularly in epistemology, can become the start of a self-fulfilling prophecy where change and progression also becomes impossible.<sup>28</sup> Carr argues that "there is no objective, historical truth"<sup>29</sup>. Objectivity can never exist in fact, but only in the relation between fact and interpretation, between past, present, and future.<sup>30</sup>

Carr's rejection of objectivity is attacked in what is commonly known in International Relations as the "second debate"<sup>31</sup>, which is concerned partly with the epistemological status of realism as a framework of analysis. Realism today is often assumed to be inherently positivistic<sup>32</sup>, and this is mainly due to the proliferation of empirically-focused theories of International Relations throughout the Cold War. As a result, classical realists like Carr are often lumped in together with neorealists - the textbook picture of realism shows the theory as pessimistic and strongly rooted in science. Theorists like Morton Kaplan object to this type of generalization, and frequently argue that classical realists are not scientific in the least. Indeed, Kaplan states that most of the arguments against a scientific theory of politics come from *The Twenty Years' Crisis*.<sup>33</sup> Kaplan further goes on to argue that science "requires a secondary language that permits reasonable precision and replicability".<sup>34</sup> This type of scientific discourse does not appear in Carr's work. For instance, Carr explains that "the concept of absolute truth is not appropriate to the world of history- or, I suspect, to the world of science". Indeed, out of the different characteristics Kaplan ascribes to the "traditionalist scientist" - including precision, rigor, quantification, and general theory - Carr only actively promotes one (rigor), and furthermore, argues against the idea that it is possible to make universal theories or that strict empiricism is more than a fetishism of the facts.<sup>35</sup> "The Positivists," argue Carr, contribute to the "cult of facts" and propose that facts exist "independent of [the observer's] consciousness".<sup>36</sup>

Another viewpoint taken by some neorealists is that realism must remain strictly theoretical. Thinkers such as Kenneth Waltz argue that theory must actually be an abstraction from reality. "Such an attitude," argues Carr, "advocated in the name of objective thought, may no doubt be carried to a point where it results in the sterilization of thought and the negation of action"<sup>37</sup>. For Carr, the Waltz-type thinkers are yet another "foil" for classical realism, much like the Wilsonian utopian.<sup>38</sup> Waltz's skeletal version of realism is in some ways the polar opposite of Carr's dialectic approach to classical realism. The pure realist is trapped in a self-fulfilling prophecy, where he is deprived of the possibility of progress and change, because his viewpoint is overly theoretical.<sup>39</sup>

Robert Gilpin, on the other hand, explains that realism is not a "scientific" theory, but rather an attitude regarding the human condition.<sup>40</sup> He goes on to describe the major assumptions shared by all realist thinkers - including the conflictual nature of international affairs, the essence of society as the group, and the primacy of power and security in human motivation.<sup>41</sup> Based on these assumptions, Carr would be considered a realist. However, unlike many other realists, he does not see these assumptions as fixed - in fact, Carr discusses in *Nationalism and After* the idea that the state may not remain the unit of analysis in International Relations.<sup>42</sup> This reflects Carr's epistemological relativism, however, Gilpin seems unable to accept this dynamic element in Carr's theory. When reacting against Richard Ashley's assessment of the differences between realism and neorealism, he tells us that no classical realist "argue[s] for subjectivism"<sup>43</sup> in International Relations theory. Ashley, a postmodernist, says that he sees

a more authentic approach to International Relations in classical realism.<sup>44</sup> In this way, Carr's theory of International Relations is not a "scientific, positivistic realism", but rather a more "relative realism".

This brings us to an evaluation of the contemporary relevance of Carr's theory of International Relations. The influence of the Carr is most closely examined in Ken Booth's writings on what he calls "utopian realism"<sup>45</sup>. Booth argues that Carr is misunderstood, and many parts of Carr's writing are ignored by realists who cling to Carr's famous attack on utopianism.<sup>46</sup> Indeed, Booth writes that "utopianism has been ghettoized by negative labeling," and until quite recently (or arguably still today) is used to discredit new proposals.<sup>47</sup> Many fail to realize that while Carr argues against utopianism, he also accepts the idea that an optimistic view of International Relations is needed to move forward in the discipline (both in the theoretical and practical sense). Additionally, Carr's relativism allows for a normative element that is and has been rejected by most of the well-known realist thinkers since Carr. What is necessary is a reexamination of theorists like Carr and the terms by which such thinkers describe utopianism and realism. In their pure forms, neither theory is particularly "realistic" in the sense that both lack practical application, nor can either be easily ignored upon a close reading of Carr.

Another aspect of current debate in International Relations theory revolves around questions of epistemology. Many scholars argue that Carr is particularly relevant here, because he reminds the theorist/philosopher that the "political sciences can never wholly emancipate themselves from utopianism"<sup>48</sup>, meaning that it is important to keep debates relevant despite methodological or theory of knowledge disputes. Hedley Bull, in his 30 year evaluation of *The Twenty Years' Crisis*, observed that Carr made it important to "restore a moral or normative element to International Relations – not by returning to particular moral doctrines ... but by recognizing the role played by values in international society"<sup>49</sup>. Interestingly, Carr himself also observed that

Progress in human affairs, whether in science or in history or in society, has come mainly through the bold readiness of human beings ... to present fundamental challenges in the name of reason to the current way of doing things and to the avowed or hidden assumptions on which it rests.<sup>50</sup>

This reflection remains pertinent to this day, particularly in light of the development of newer, post-positivist theories such as constructivism. Alexander Wendt, for instance, argues that to the extent that realism is about power, he too is a realist who analyses the role of power in the norms, identities, and processes that shape our understanding of International Relations.<sup>51</sup> Upon reading this type of language, one is reminded of Carr's rejection of positivism and his continued emphasis on the values that shape our interpretation of facts.

Clearly, one might conclude that Carr's influence on a vast range of International Relations theorists is unparalleled in the discipline. Both the philosophical problems as well as the actual issues that Carr addresses in his work are relevant today, from the debate on relativism and empiricism to issues of security, nationalism, and the notion of peaceful change.<sup>52</sup> It is for this reason, as well as the continued force of his relativist approach, that Carr is still relevant today. While *The Twenty Years' Crisis* is firstly a reactionary period piece, it sets up a framework through which the discipline of International Relations is still viewed today - the idealist/utopian and realist paradigms - and it is the only major text in the history of the discipline to be so highly regarded by both major constituencies, while also managing to critique them both<sup>53</sup>. Additionally, Carr's work provides one of the only theories that is able to successfully argue for a dialogue between, and even the combination of, the two dominant paradigms in International Relations theory. This combination, which is based on epistemological relativism, makes it important for contemporary students of International Relations to take another look at Carr and the idea of a more utopian realism<sup>54</sup>. In the modern discipline, successful political theory acknowledges that scientific or not, political thought itself is always a form of political action<sup>55</sup>.

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<sup>1</sup> E.H. Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations*, (London: MacMillan & Co, 1961), 5

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<sup>2</sup> Robert G. Gilpin, "The richness of the tradition of political realism" in *International Organization*, Vol 38, No 2, 291

<sup>3</sup> Positivism refers to the theory that all knowledge is based on sense-experience and is testable. (see: Penguin Dictionary of Philosophy). One idea central to the theory is objective truth does exist. Post-positivists seek to reject this claim and that there are no objective truths as the meaning of facts is conditioned by the values and beliefs of those who present them.

<sup>4</sup> For the purposes of this paper, I will be focusing on two of Carr's most influential works: *The Twenty Years' Crisis* and *What is History?*. Carr's additional works, most notably *Conditions of Peace and Nationalism* and *After* deal more with Carr's predictions for the future of International Relations rather than the establishment of a discipline and its method.

<sup>5</sup> Carr, *The Twenty Years' Crisis*, 62

<sup>6</sup> I will argue later in the paper, however, that while Carr is often thought of as one of the founders of classical realism, the idealist arguments in his work are often overlooked, leading to a misunderstanding not only of his theory, but also of his epistemological orientation.

<sup>7</sup> For instance, Part I of *The Twenty Years' Crisis* is titled "The Science of International Politics", while the first chapter is called "The Beginnings of a Science".

<sup>8</sup> Carr, *The Twenty Years' Crisis*, 2

<sup>9</sup> E. H. Carr, *What is History?*, (Reading, UK: Penguin Books, 1964), 85

<sup>10</sup> Carr, *The Twenty Years' Crisis*, ix

<sup>11</sup> The aim of both types of science is the amelioration of the human condition. See Carr, *What is History?*, 69-70

<sup>12</sup> Carr, *The Twenty Years' Crisis*, 3-4

<sup>13</sup> Carr, *What is History?*, 9

<sup>14</sup> *Ibid*, 55

<sup>15</sup> Carr, *The Twenty Years' Crisis*, ix-x

<sup>16</sup> Charles Jones, *E. H. Carr and International Relations: A Duty to Lie*, (Cambridge, UK: Cambridge University Press, 1998), 122

<sup>17</sup> J. Samuel Barkin, "Realist Constructivism" in *International Studies Review*, Vol?, No 5, 338

<sup>18</sup> Carr, *What is History?*, 65

<sup>19</sup> Peter Wilson, "Carr and his Early Critics: Responses to *The Twenty Years' Crisis*, 1939-46" in Michael Cox, *E.H. Carr: A Critical Appraisal*, (London: Palgrave Publishers, 2000), 166

<sup>20</sup> Hans Morgenthau, "The Political Science of E. H. Carr" in *World Politics*, Vol 1, No 1, 134

<sup>21</sup> *Ibid*, 129

<sup>22</sup> Hedley Bull, "The Twenty Years' Crisis Thirty Years On" in *International Journal*, Vol 24, 626

<sup>23</sup> Morgenthau, 4

<sup>24</sup> Carr, *The Twenty Years' Crisis*, 13-14

<sup>25</sup> E. H. Carr, "An Autobiography" in Michael Cox, *E.H. Carr: A Critical Appraisal*, (London: Palgrave Publishers, 2000), xvii-xviii, xxi

<sup>26</sup> The various dialectics include theory-practice, utopianism-realism, intellectual-bureaucrat, appeasement-force, and morality-power. Carr argues in each case that the creation of a balance and a continuous, dynamic dialogue between each aspect is the best approach.

<sup>27</sup> Carr, *The Twenty Years' Crisis*, 75

<sup>28</sup> Carr, *The Twenty Years' Crisis*, 93

<sup>29</sup> Carr, *What is History?*, 26

<sup>30</sup> *Ibid*, 120 and 130

<sup>31</sup> The second debate, which was largely a methodological debate, is also known as "the behavioural episode".

<sup>32</sup> Positivism refers to the theory that all knowledge is based on sense-experience and is testable. See the Penguin Dictionary of Philosophy.

<sup>33</sup> Morton Kaplan, "The New Great Debate: Traditionalism vs. Science in International Relations" in *World Politics*, Vol 19, No 1, 1

<sup>34</sup> *Ibid*, 4

<sup>35</sup> Carr, *What is History?*, 16

<sup>36</sup> *Ibid*, 9

<sup>37</sup> Carr, *The Twenty Years' Crisis*, 10

<sup>38</sup> Barkin, 337

<sup>39</sup> Carr, *The Twenty Years' Crisis*, 11

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- <sup>40</sup> Gilpin, 290  
<sup>41</sup> Ibid.  
<sup>42</sup> Jones, 87  
<sup>43</sup> Gilpin, 302  
<sup>44</sup> R. B. J. Walker, "Realism, Change, and International Political Theory" in *International Studies Quarterly*, Vol 31, No1, 66  
<sup>45</sup> Ken Booth, "Security in Anarchy: Utopian Realism in Theory and Practice" in *International Affairs* (Royal Institute of International Affairs 1994- ), Vol. 67, No.3, 527  
<sup>46</sup> Ibid, 531  
<sup>47</sup> Ibid, 535  
<sup>48</sup> Carr, *The Twenty Years' Crisis*, 9  
<sup>49</sup> Bull, 632-633  
<sup>50</sup> Carr, *What is History?*, 155  
<sup>51</sup> Barkin, 329  
<sup>52</sup> Bull, 638  
<sup>53</sup> Tim Dunne, Michael Cox, and Ken Booth, "Introduction: The Eighty Years' Crisis" in *Review of International Studies*, Vol 24, No 5, v  
<sup>54</sup> Booth, 527  
<sup>55</sup> Carr, *The Twenty Years' Crisis*, 5

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This image was taken at the United Nations Headquarters in New York. The UN was holding a special anti-globalization exhibit in the courtyard outside one of the UN buildings. Directly behind the exhibit, through the bushes, was this image of one of Pepsi-Cola's international headquarters. Ironical?

# **The Politics of Trade and Economic Development: American Involvement in Southeast Asia**

David Brooks

The United States' economy and the foreign policy created around it affects the world disproportionately to that of most other nations. Though its position as leader of the world economy in the post-WWII era appears to be waning—if currency value, current accounts, stock markets, and international organization are valid indicators—the U.S. still has the largest economy and military, and remains the world's only surviving superpower.

However, to what extent does the U.S. deserve its reputation as the principal representative of a liberal world economic order—particularly as it relates to the Pacific Rim? One may choose any tool of U.S. foreign economic policy—trade, finance, security, or development—and see that the liberal rhetoric is often inconsistent with policy actions in this particular region. Moreover, however dynamic a policy may appear, especially in response to world-changing events such as the terrorist attacks of September 11 2001, the fundamental policy to protect the interests of the U.S. at all costs remains.

Though the matter of categorizing U.S. foreign economic policy may be important in itself, this paper contends that what is more important is how this policy affects countries with which the U.S. deals. Given the scholarly interest in the well-being of developing countries, this paper chooses to focus on the observation of U.S. policy in Southeast Asia, a region composed of a large number of developing countries in the Pacific Rim. Using Malaysia as a case study, this paper shows that U.S. policy does not stand in opposition to meaningful development in Southeast Asia, and can be actually have a beneficial impact.

This study begins with a historical perspective on U.S. foreign economic policy in Southeast Asia beginning in the post-WWII period. It continues to the time of Japanese economic decline and the corresponding increase of U.S. economic involvement in the region. Following this analysis, the paper takes a more in-depth look at recent and current U.S. policy in the region, including the U.S. promotion of trade liberalization, the use of aid as a reward for conformity, and its relations with two dominant organizations in the region, the Association of Southeast Asian Nations (ASEAN) and the Asia-Pacific Economic Cooperation (APEC). Following these discussions on the main tenets of U.S. foreign economic policy in the region, the paper uses Malaysia as a case study to more thoroughly reveal the policy affects.

## **II. U.S. Economic Policy in Southeast Asia**

### *2.1 Post-WWII and Cold War: From a Welcome Japanese Hegemony to the 'Japanese Challenge'*

Contrary to the notions of a liberal ideal, politics led economics in the postwar years as the United States favored the Pacific Rim hegemony of Japan. Kevin G. Cai claims that part of the U.S. strategy in the Asia-Pacific following WW2 was to “encourag[e] regional economic integration centered on Japan with all non-communist East Asia (including both Northeast and Southeast Asia) as the market and source of raw materials for the Japanese economy.”<sup>1</sup> Because the liberal ideal embodies at least a normative commitment to, if not a positive definition of, what Robert Gilpin terms a spontaneously arising market,<sup>2</sup> one should not seek to describe U.S. policy in this case in liberal terms.

The promotion of Japan as the economic core of the region was part of a broader policy of containment, which placed considerations of security at the helm of economic policy. In their study of the U.S.'s relationship with APEC, Vinod K. Aggarwal and Kun-Chin Lin describe the “international trading system” during the Cold War period as being “nested ... within the overall security system,” which allowed the U.S. to “[maintain] a coherent approach to the trading system – founded on its interest in promoting multilateralism – and ensured that its trading partners grew to buttress the Western alliance

<sup>1</sup> Cai, “The Political Economy of Economic Regionalism in Northeast Asia: A Unique and Dynamic Pattern”, 8.

<sup>2</sup> Gilpin, *The Political Economy of International Relations*, 27.

against Soviet encroachment.”<sup>3</sup> Foreign economic policy—in this case embodied in trade and multilateral economic cooperation—was not then aimed at an acceptable liberal cause such as correcting a market failure,<sup>4</sup> or giving newly independent Southeast Asian nations a level playing field from which to build their comparative advantage; rather, it was aimed at securing a region friendly to U.S. political interests.

However, just as the U.S. promotion of Japanese hegemony in Southeast Asia should not be seen as liberal, neither should its eventual categorization of Japan as an economic competitor. With détente and an end to the Cold War came a “[weakening of] the security argument for continuing economic cooperation.”<sup>5</sup> Indeed, Lawrence B. Krause describes the development of Japan toward “a competitive advantage in a number of high-technology products” as being a root of the “competitive struggle between American and Japanese firms to export high-technology products to ASEAN.”<sup>6</sup> This struggle was merely indicative of a greater shift in U.S. policy in the region. While the United States saw Japan as an effective obstacle to communist inroads into Southeast Asia during the height of the Cold War, it quickly shifted to a competitive stance with the loss of this particular security threat.

### III. Recent and Current U.S. Economic Policy in Southeast Asia

In part, a historical survey of U.S. foreign economic policy affecting Southeast Asia helps place a foundation for understanding contemporary policy in the region. Despite the language of the recent Clinton and Bush administrations, both of which have paid rhetorical tribute to liberal economic ideals such as free trade, aid for the promotion of growth-oriented liberal economies, and multilateralism, a deeper investigation reveals a policy not constrained by the liberal model.

#### 3.1 Trade Liberalization

Trade forms one facet of increasing importance to U.S. foreign economic policy in Southeast Asia, attributable to both an increase in the volume of trade as a proportion of U.S. GDP as well as the increasing proportion of that trade occurring between the U.S. and Southeast Asia. Jeffrey J. Schott reminds us that the U.S. trade-to-GDP ratio tripled from the 1960s to 2003 for merchandise, from 6.7 to 18 percent. Add to that the trade in services and that made the latter number 23 percent.<sup>7</sup> Schott concludes that the U.S. “is now much more open to international trade than a generation ago.”<sup>8</sup> While trade liberalization is certainly a key component of liberal economics, the U.S. diverges from pure trade liberalization in this region in its preference for bilateral deals.

One can look at U.S. bilateral trade agreements in two ways: as the second-best alternative to global free trade, or as the preferred policy. The latter is less likely given the support in the World Trade Organization (WTO) for global free trade. Christina Sevilla argues in favor of the former view; however, she highlights a dynamic to this view that is distinctively non-liberal—namely that the U.S. policy is an aggressive attempt to hold influence over less powerful countries in a global system that has collectively balked at free trade:

Although a trading system crisscrossed by a patchwork of bilateral deals is less preferable to a global system of rules for all parties, the reality is that the United States, the EU and a few other developed countries and regional powers are big enough to take care of their own market access interests in a post-Cancun trade bargaining free-for-all.<sup>9</sup>

Cancun represents the latest failed attempt at freer global trade in the Doha round of negotiations. Where a system characterized by global free trade might have been more beneficial for smaller economic players, since they receive an equal voice in the WTO, the terms of agreements taking place between the

<sup>3</sup> Aggarwal and Lin, “Strategy Without Vision: The US and Asia-Pacific Economic Cooperation”, 96.

<sup>4</sup> Gilpin, *Political Economy*, 29.

<sup>5</sup> Aggarwal and Lin, “Strategy Without Vision”, 100.

<sup>6</sup> Krause, *U.S. Economic Policy Toward ASEAN*, 38.

<sup>7</sup> Schott, “Confronting Current Challenges to US Trade Policy”, 247.

<sup>8</sup> Ibid.

<sup>9</sup> Sevilla, “The WTO’s North-South Conflict: A Dangerous New (Old) New International Economic Order?”, 125.

U.S. and one of these small countries will likely favor the United States. The U.S. self-interested trade policy may not be as enlightened as the liberal theory requires.

Table 1 U.S. Trade Agreements with ASEAN Countries

Country	TIFA	FTA under negotiation	FTA
Singapore	X		X
Malaysia	X	X	
Thailand	X	X	
Indonesia	X		
Philippines	X		
Cambodia	X		
Brunei	X		

Source: Based upon U.S. Trade Representative Reports

Since the Cancun round, U.S. bilateral trade agreements in Southeast Asia have proliferated, in the form of Free Trade Agreements (FTAs) and their less aggressive forerunner, the Trade and Investment Framework Agreement (TIFA), which generally “creates a Joint Council to examine ways in which to expand and liberalize trade and investment between [the second party] and the U.S.”<sup>10</sup> Table 1 illustrates the progress of bilateral deals in ASEAN: so far, the U.S. has an FTA with Singapore and is negotiating FTAs with Malaysia and Thailand. They have already set up TIFAs with Singapore, Malaysia, Thailand, Indonesia, the Philippines, Cambodia, and Brunei.

Furthermore, to whom the U.S. offers an FTA may depend on whether the country has been politically supportive of American foreign policy thus far. This is contemporary evidence of the U.S. subjugation of economics to politics. Michael Richardson annunciates this view: “the US approach of rewarding political friends and penalizing opponents of its foreign policy will complicate and slow the process of extending the network of FTAs linked to the US.”<sup>11</sup> Richardson then uses the quick extension of an FTA to Singapore, a supporter of the U.S. invasion of Iraq, as evidence of the political nature of FTAs. U.S. trade policy in Southeast Asia, then, is not purely liberal when viewed in terms of its interests in bilateral FTAs.

### 3.2 *Aid: a Reward for—and Assistance to—Conformity*

The second area of contemporary U.S. foreign economic policy that discredits liberal theory is government to government aid. Cline and Williamson tie U.S. development aid to the security argument: “Today the most immediate threat facing the United States is international terrorism. This reality should sharpen the United States’ recognition that the security self-interest in global development remains vital.”<sup>12</sup> As mentioned in the historical analysis, a subjugation of economic interests to those of security is contrary to liberal normative and positive theory.

However, U.S. aid mainly represents a policy of supporting conformity to standards that favor a specific U.S. economic model. This is a conformity that predisposes the country’s or organization’s (in the case of ASEAN) government to easier U.S. foreign direct investment (FDI). The United States Agency for International Development USAID, launched the ASEAN-U.S. Enhanced Partnership (EP) in 2005, which established the Technical Assistance and Training Facility and laid out the general goals of better understanding of standards and conformity, the protection and enforcement of intellectual property

<sup>10</sup> US-ASEAN Business Council, Inc., “US-Brunei TIFA Builds on Trade and Investment Momentum with ASEAN”, [http://www.us-asean.org/Press\\_Releases/2002/brunei\\_tifa.htm](http://www.us-asean.org/Press_Releases/2002/brunei_tifa.htm) (accessed November 19, 2007).

<sup>11</sup> Richardson, “Asians Fear Rising US Protectionism”, <http://yaleglobal.yale.edu/display.article?id=2565> (accessed November 19, 2007).

<sup>12</sup> Cline and Williamson, “Fostering Development”, 409-10.



rights, and the development of “sound competition policy” in ASEAN countries.<sup>13</sup> Each of these makes doing business in Southeast Asia easier for U.S. firms. The goal of this U.S. policy is not necessarily to make the market more open to any firm that is most competitive, since many capitalist countries with competitive firms do not recognize or emphasize issues like intellectual property rights or “sound competition policy,” which probably refers to anti-trust regulation and a clear public-private sector division. U.S. aid policy, then, is firmly planted in a U.S. interest that is not dependent on liberal ideology.

### *3.3 Multilateral Institution Relations*

The relationship of the U.S. with ASEAN and APEC forms the third critique of U.S. economic policy in Southeast Asia. With both institutions, the United States favors opportunism over an ideological commitment to the liberal theoretical foundation so often attributed to the country. The U.S. policy in regards to the Southeast Asian regional cooperation organization, ASEAN, which comprises virtually all of geographical Southeast Asia, is often termed ‘open regionalism’. This policy is supportive of both regional integration and the maintenance of markets open to the rest of the world, or at least to the United States. USAID began its “ADVANCE” program to promote ASEAN economic integration, and President Bush made comments in support of the same goal.<sup>14</sup> However, the President also called for greater ASEAN-U.S. trade ties and for support of the Doha trade round.<sup>15</sup> The United States seeks a position of influence in ASEAN, so that U.S. firms are not left out in either regionalization or globalization, again regardless of the ideologically-consistent option. In short, the USA is working toward all options at once, regardless of which is the most economically liberal.

Similarly, the U.S. actions in APEC, an important forum for observing U.S. policy in Southeast Asia and the greater Pacific Rim, have been thought of as “opportunistic,” disregarding the original purpose of the organization, while at the same time disregarding any one ideology.<sup>16</sup> Aggarwal and Lin believe the U.S. relationship with APEC evidences “strategy without vision,” which has helped neither the Doha round of world trade talks nor APEC.<sup>17</sup> They argue that the U.S. has “searched for the path of least resistance among bilateral, minilateral and multilateral approaches, be they for a few or many products, alternating among them whenever an earlier commitment runs into obstacles,” actions that display a “lack of ... credible institutional commitments.”<sup>18</sup> In a more Marxian argument, Ian Taylor states that security arguments for trade negotiations within APEC contain an effort to “reconfigure the Asia Pacific region along neoliberal lines.”<sup>19</sup> Though Taylor’s article may assume too eagerly the U.S. commitment to liberalism, it still corroborates the self-interested opportunism at the root of U.S. policy. U.S. economic relations with ASEAN and APEC, then, force one to question the liberal notions of multilateralism and place them within a scenario where U.S. gain is paramount, and other considerations, such as ideological commitment or institutional efficacy, are secondary.

## **IV. The Potential Convergence of Southeast Asian Economic Goals and U.S. Interests**

A number of points have been made in this paper that would seem to preclude self-directed development by Southeast Asian countries. There is a temptation to come to a false, or at least premature, conclusion that because U.S. policy does not live up to a liberal ideal seeking equal economic

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<sup>13</sup> USAID, “United States Assistance to ASEAN”, [http://www.asean-us-partnership.org/us\\_assistance1.htm](http://www.asean-us-partnership.org/us_assistance1.htm) (accessed on November 10, 2007).

<sup>14</sup> USAID, “Advancing the ASEAN-US Enhanced Partnership”, <http://www.asean-us-partnership.org/advance.htm> (accessed on November 10, 2007).

<sup>15</sup> A reexamination of trade policy is not necessary, and the argument continues as to whether trade barrier removal on a regional basis constitutes a step in the right direction of global trade liberalization—the liberal prerogative—or a development toward regional exclusionism. However, following the line of reasoning used in the trade policy discussion, the U.S. concern is for its own interest, not for an ideological preference for liberal or illiberal policy.

<sup>16</sup> Aggarwal and Lin, “Strategy Without Vision”, 87.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., 88.

<sup>19</sup> Taylor, “APEC, Globalization, and 9/11: The Debate on What Constitutes Asian Regionalism”, 463.

opportunities for all, it is necessarily bad for the development of Southeast Asian countries. It is premature because one must look first at the development goals of a particular country as well as the effects thus far of the particular U.S. policy. After this is done, one can better answer the question of whether the policy—in spite of its ideology or lack thereof—is good or bad for Southeast Asian development.<sup>20</sup> In order to carry out this task, Malaysia will be used as a case study.

During the Asian financial crisis and shortly thereafter, Malaysian Prime Minister Mahathir showed distaste, to put it mildly, for the economic model espoused by the U.S. He made comments about IMF economists being “Wall Street types” and “morons,” and railed against the “immorality” of foreign currency trading.<sup>21</sup> However, today the U.S. is Malaysia’s largest trading partner and the largest source of private investment (approximately \$10 billion),<sup>22</sup> indicating that U.S. policy has had, and will continue to have, a large effect on Malaysian development. In order to determine the nature of this effect, it helps to define Malaysia’s development goals and then to explore the benefits and disadvantages of U.S. policy for Malaysia. From this approach, this paper claims cautiously that the benefits to Malaysia of U.S. foreign economic policy outweigh the disadvantages when held in check by certain Malaysian government policies.

Malaysia’s National Vision Policy (2001) outlines the country’s latest set of development goals, and forms a useful basis for examining U.S. policy implications. The core of the National Vision Policy is based on increasing the budget for education and refocusing the economy towards higher-technology production. These form the basis for the ultimate goal of having a fully-developed economy by 2020.<sup>23</sup>

#### 4.1 *Benefits of U.S. policy*

The benefits of U.S. policy in attaining these goals come in the form of economic growth and development, which allow for increased expenditure on education and technology transfer through direct foreign investment—a means toward the higher-technology production desired. In the first place, the Malaysian economy has developed quickly over the past twenty years, a period when U.S. economic involvement in Southeast Asia increased greatly. The percentage of the workforce engaged in agriculture decreased from 19.8 in 1986 to 8.7 in 2006, while the percentage involved in industry increased from 38.5 in 1986 to 49.9 in 2006.<sup>24</sup> Most economists agree that a transition from agriculture to manufacturing and services is an integral part of economic development; so these numbers show that U.S. policy is at the very least not hindering the transition to higher value-added production—a transition necessary if the government wishes to increase education expenditure.

Secondly, U.S. policies in the form of development assistance and trade may be opening the door for the higher-technology production desired by Malaysia. U.S. aid devoted to standards and regulations-conformity in ASEAN and bilateral trade agreements with Malaysia (one of which being negotiated is an FTA), make the country more attractive for U.S. high technology firms. Firms such as Intel, Dell, and AMD have already located production facilities in Malaysia. Conformity measures, such as intellectual property rights agreements, are important to U.S. firms because they ensure that the firm will be allowed the due profit for its production. At the same time, freer trade with the U.S. means these high technology firms will not face penalties when exporting their goods to the large U.S. market.

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<sup>20</sup> The limitations to this approach are obvious: not every country in Southeast Asia has had the same experience as Malaysia. For a more comprehensive approach, one would need to study each country individually—a task outside the scope of this paper. Nonetheless, a case study of Malaysia can provide some important generalizations and this section offers a provocative starting point for further research and conversation.

<sup>21</sup> Haber, “Southeast Asia currency crisis impacts U.S. investment track – Malaysia – Industry Trend or Event”, [http://findarticles.com/p/articles/mi\\_m0EKF/is\\_n2187\\_v43/ai\\_19805341](http://findarticles.com/p/articles/mi_m0EKF/is_n2187_v43/ai_19805341) (accessed November 10, 2007).

<sup>22</sup> USTR, “Malaysia - Trade News”, [http://www.ustr.gov/World\\_Regions/Southeast\\_Asia\\_Pacific/Malaysia/Section\\_Index.html](http://www.ustr.gov/World_Regions/Southeast_Asia_Pacific/Malaysia/Section_Index.html) (accessed November 10, 2007).

<sup>23</sup> U.S. Department of State, “Background Note: Malaysia”, <http://www.state.gov/r/pa/ei/bgn/2777.htm> (accessed November 10, 2007).

<sup>24</sup> Data from World Bank, “Malaysia at a glance”, [http://devdata.worldbank.org/AAG/mys\\_aag.pdf](http://devdata.worldbank.org/AAG/mys_aag.pdf) (accessed November 10, 2007).

#### 4.2 *Potential Disadvantages of U.S. Policy and Place of Malaysian Policy*

Though these benefits of U.S. policy are compelling, potential disadvantages remain. These disadvantages embody the counter-argument to the thesis that U.S. policy does not preclude meaningful development in the region, and include over-dependence on the U.S. market and a lack of bargaining power. In the first case, an over-reliance on the U.S. market and on U.S. firms supplying that market, makes Malaysia susceptible to downturns in the economy on both fronts. If U.S. consumer power decreases, as can happen with a fall in the U.S. dollar, Malaysian exports in general will be harmed. With a large proportion of its exports going to the U.S., a more protectionist trade policy in the U.S. would also immediately disadvantage Malaysia. A good example of the problem with dependence on U.S. technology firms is the dot-com bubble burst—an event which almost plunged Malaysia into recession, because of its vast ICT sector.<sup>25</sup> A free trade agreement might exacerbate this problem, as it encourages ever more reliance on the U.S. market and U.S. firms, compared with a multilateral agreement with East Asia or the world through the WTO. It is also not difficult to imagine that an FTA would be drawn up on U.S. terms, hindering Malaysia's bargaining power.

In both cases, however, Malaysia can mitigate many of the potentially harmful effects through focused government policy. Government policy must provide incentives for more diverse industry activity in Malaysia, especially attracting the service sector. As a starting point, the natural compliment to the current mix of high technology firms is business support services. To establish business support services the government would need to allocate part of the income derived from high technology production to education and professional training. In regards to trade deals, greater bargaining power might be maintained if Malaysia works to strike more deals as part of ASEAN, instead of bilaterally with the U.S. In this case, the Malaysian government could focus policy on strengthening its relations with its neighbors and defining common ground in order to develop a firmer bargaining position. Policy implementation by the Malaysian government would, then, allow the country to continue to enjoy the proven benefits of an economic relationship with the U.S. while diminishing its disadvantages.

#### **V. Conclusion**

U.S. policy in Southeast Asia cannot be sublimated to enlightened liberalism; it is far too self-interested in a volatile, anarchic global system. This being the case, however, does not keep Southeast Asian countries from meeting their development goals, exemplified by Malaysia. Since the end of WWII, through the Cold War era of Japanese preference and communist containment, and through also the post-Cold War period, U.S. foreign economic policies in Southeast Asia were not constrained by a liberal ideological straitjacket. Yet up to the present day, Malaysia has experienced meaningful economic development alongside greatly increased U.S. economic involvement in the region.

Current events make this study more interesting, as the U.S. economy seems on the verge of a recession. A falling U.S. dollar and slow growth could reignite historical U.S. protectionism to a greater degree than that seen today, adding another dimension to the central argument of this paper. The rise of China, a country seen by many as the future counterweight to U.S. hegemony, might also be cause for protectionist actions with regard to Southeast Asia, as economic relations between China and the region are increasing. Figure 2 shows an increase of trade between China and ASEAN and Oceania from about \$10 billion in 1990 to over \$60 billion in 2002. A situation in which U.S. protectionism increased to safeguard the health of its economy, would lead this author to make a more negative prognosis for the general benefits or disadvantages of U.S. policy in Southeast Asia. However, if the trend evidenced by Malaysia continues, U.S. interests in Southeast Asia—however illiberal—will remain strong, and so will the benefits to development in the region.

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<sup>25</sup> U.S. Department of State, "Background Note: Malaysia", <http://www.state.gov/r/pa/ei/bgn/2777.htm> (accessed November 10, 2007).

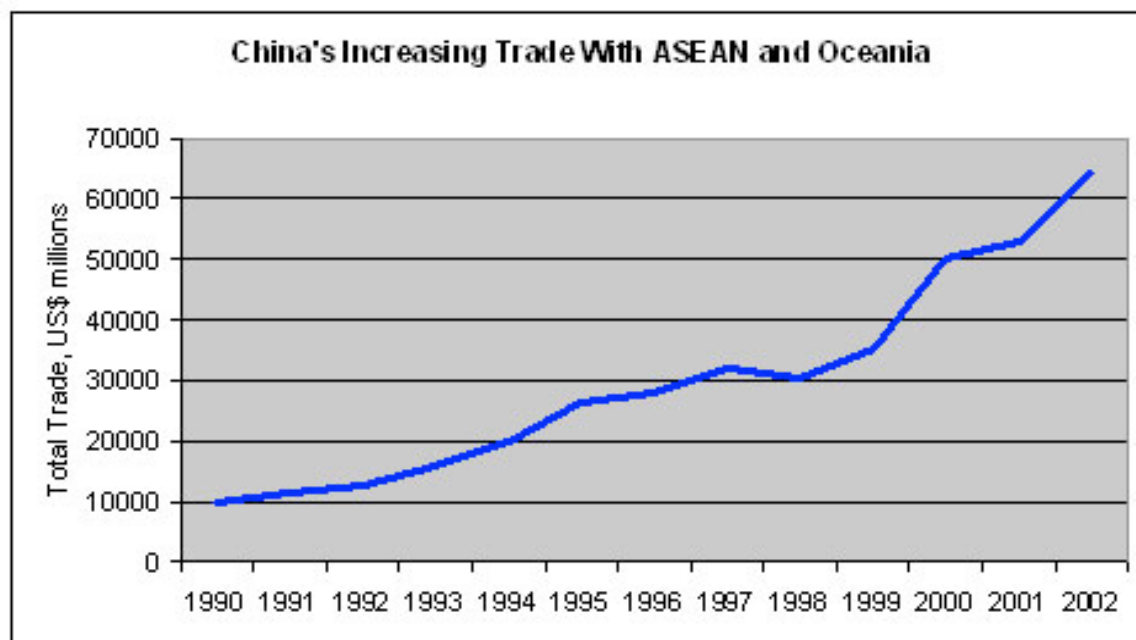


Figure 2 “China’s Increasing Trade With ASEAN and Oceania”

Source: U.S. Department of State

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## **Homosexuality, Abortion and Pornography: Moral Problems or Issues of Inequality?**

Iva Erceg

The concepts of law and morality and the extent to which the former is influenced by the latter have long been debated by legal philosophers, moralists, and activists. Lord Devlin, a conservative legal moralist, is a modern advocate of the ancient idea that law should prohibit acts simply because they are immoral according to society's shared conception of morality. Catharine MacKinnon, a radical legal feminist, believes that this shared morality is dominated by a male perspective and thus the state and its laws adopt a male point of view when forming the laws, institutions, and constitutions, thereby institutionalizing gender inequality. Devlin and MacKinnon disagree on a number of issues, such as the prohibition of homosexuality and abortion, and where they agree, as with the notion that pornography should be banned, they come to the conclusion through different justifications. By examining laws which regulate homosexuality, abortion, and pornography, MacKinnon successfully reveals how the male standpoint, which dominates the legal system, allows for sex inequality. Although both of their theories are criticized in this paper, I will argue that MacKinnon's feminist theory of society's laws and morals is ultimately more compelling and accurate than Devlin's social cohesion theory.

In 1959, Devlin challenges the UK Report of the Departmental Committee on Homosexual Offences and Prostitution, or the Wolfenden Report, in the form of lectures; the first being his Maccabean Lecture in Jurisprudence, entitled "The Enforcement of Morals".<sup>1</sup> It was a response to various statements and recommendations made by the Committee regarding the functions of criminal law and morality. These statements included the claim that the function of the criminal law is "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others", and that it is not its function to "intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour" or private morality.<sup>2</sup> In addition

to commenting on the role of criminal law, the Committee recommended that homosexual acts between consenting adults in private should no longer be a criminal offence.<sup>3</sup>

Devlin challenges the Committee's claims that immorality is not enough to warrant legal intervention and that homosexuality should be decriminalized. This challenge stems from his social cohesion argument which purports that one of the vital elements of society is a shared morality, or common agreement about what is right and what is wrong. He further argues that if this shared morality is weakened or altered, this could potentially lead to the destruction or disintegration of that society.<sup>4</sup> This, he claims, is because society is held together "by the invisible bonds of common thought" and not by any physical constraints.<sup>5</sup> A violation of these moral standards is an offence to society as a whole, according to Devlin, and even if individuals practicing vice do not harm anyone directly, they cease to be useful members of society, thus harming it. In addition, immoral activity promotes disbelief in the common morality and ideas of right and wrong, causing indifference, and thereby harming society.<sup>6</sup> Due to the alleged harm caused by what is purported to be immorality, Devlin believes that society is entitled to protect itself against it. According to him, a change in society's morality or a weakening of it would lead to a destruction of society.<sup>7</sup> He disagrees with the Committee and claims that since a shared morality is essential to society's existence, the law is justified in intervening in the private realm to preserve morality.<sup>8</sup>

However, Devlin limits the entitlement of society to use the law to enforce morality. He claims that if an immoral act poses no danger of corruption and if it is tolerated by the citizens, the law should not prohibit it.<sup>9</sup> The punishable immorality must cause "intolerance, indignation, and disgust," not simply a dislike of the practice, and there must be a genuine feeling that the presence of the act is an offence.<sup>10</sup> In order to find out what a given society's moral judgements are, Devlin points to a "reasonable man" who may base his judgements solely on his feelings. In other words, immorality is what a right-minded man, who could be found on the street, or twelve men and women drawn at random, would consider to be immoral.<sup>11</sup> Devlin asserts that laws are based on such shared moral principles. He says that the law-maker creates laws based on the common belief and that complete separation of crime from immorality would be bad for law.<sup>12</sup>

Given his theory of law and morality, Devlin has very conservative beliefs regarding some controversial issues. Devlin believes that homosexuality is "a miserable way of life" and that it should not be decriminalized as the Committee recommended.<sup>13</sup> Since he believes that homosexuality is capable of corrupting others and is harmful to society, it follows from his theory that it should be banned. In addition, Devlin believes that there exists a public morality that condemns homosexuality, and this shared morality should be enforced through law to prevent the disintegration of society.<sup>14</sup> Devlin also condemns abortion as immoral and believes it should be prohibited. Devlin assumes that the shared morality of society condemns abortions, and that allowing abortions risks changing society's opinions about it, which would lead to the disintegration of society due to a weakened morality.<sup>15</sup> A third putative immorality that Devlin condemns is pornography. Again, he believes society collectively disapproves of pornography as immoral, and also that it has the capacity to corrupt, thus forming the grounds for banning it.<sup>16</sup> Therefore, following from Devlin's social cohesion argument, homosexuality, abortion, and pornography should not be allowed because, according to the reasonable man, they are immoral acts and society is entitled to protect itself against immorality to avoid its own destruction.

MacKinnon, a radical feminist, has a very different outlook on law and morality, and thus disagrees with Devlin on many issues. Whereas feminism refers to a constellation of theories based on the idea that women have been treated unequally to men and have had unequal life chances, and that this inequality should be redressed, radical feminism in particular focuses on how gender hierarchy influences sexual politics.<sup>17</sup> It explores how the "eroticization of dominance and submission creates gender" and society's perceptions of men and women.<sup>18</sup> Gender inequality is not new a new phenomenon. Traditionally in modern Western societies women have been disenfranchised, excluded from public life, silenced, given the least salaried and most demeaning jobs, exploited because of their economic dependency on men, subjected to physical and sexual abuse, raped, battered, and depicted in

entertainment in manners that perpetuate and enhance a female-as-subordinate ideology.<sup>19</sup> Women have also historically been denied access to the tools of the law and to a decent education.<sup>20</sup>

As a radical feminist, MacKinnon focuses on sexuality as the dimension through which inequality and sexual hierarchy are constructed. Sexuality, according to her, is “the social process through which the social relations of gender are created, organized, expressed, and directed”.<sup>21</sup> MacKinnon believes that existing gender inequality reveals a male interest in political supremacy and hierarchy of control in which “aggression against those with less power is experienced as sexual pleasure.” In contrast, for females subordination is sexualized as pleasure and this helps constitute their gender identity.<sup>22</sup> One might question radical feminists’ exclusive focus on sexuality as the source of inequality; MacKinnon’s response would be that excluding male sexual power from the theory would “limit feminist theory the way sexism limits women’s lives.”<sup>23</sup>

MacKinnon strongly disagrees with Devlin’s idea that there exists an accepted shared morality and agreement about what is right and what is wrong. Since this is a central point of his social cohesion hypothesis, his theory is fundamentally flawed according to MacKinnon. She argues that conforming to society’s idea of morality would be conforming to an idea of morality that has been constituted from the male point of view and which has therefore worked in the interests of men.<sup>24</sup> Pornography, rape, prostitution, harassment, and laws against abortion are all, according to MacKinnon, the “male pursuit of control over women’s sexuality” and the way they are understood by Devlin is marked by a dominant societal male point of view.<sup>25</sup> This standpoint is so pervasive that a male perspective becomes the dominant societal norm and does not appear to be a particular group’s “standpoint” at all.<sup>26</sup> Thus, according to MacKinnon, it cannot be true, as Devlin says, that each society has a shared morality it is entitled to protect, since this morality is formed by only half of the population while the other half is not consulted or considered during the process.

As mentioned, Devlin argues that the law is based on morals. However, since these morals are based on a male point of view, according to MacKinnon, it follows that laws are also based on a male point of view. Since men are the ones with authority, they design the state’s institutions and they write the constitutions and legislation, thereby maintaining the status quo, and setting the standards and values of law, and thereby further codifying and entrenching this androcentric morality.<sup>27</sup> According to MacKinnon, this is why all there is to secure gender equality in the U.S. Constitution are the five words promising “equal protection of the laws” in the Fourteenth Amendment. Yet this “equal protection” applies to women only by interpretation, and was originally intended to secure rights for former slaves, not women.<sup>28</sup> The Constitution assumes that society is free and equal, but this assumption is inaccurate and based on the male point of view. Only white men, who have historically had available to them the freedoms mentioned in the First Amendment, have these freedoms protected by the Constitution, but women do not have these freedoms, so the Constitution cannot protect them to the same degree.<sup>29</sup> Therefore, MacKinnon argues that “the state, through law, institutionalizes male power over women through institutionalizing the male point of view in law.”<sup>30</sup> She argues that the “state is male” because “the law sees and treats women the way men see and treat women”, and it reinforces the existing distribution of power, thereby engaging in sex inequality.<sup>31</sup> MacKinnon thus strongly disagrees with Devlin’s idea that the law should intervene in matters of private morality because both laws and morals are based on a male point of view, and neither is a reliable source of equality or justice or perhaps even reliable morality that serves the good for all. Three examples of laws and morality working against women and in favour of men are those that regulate homosexuality, abortion, and pornography.

MacKinnon argues that homosexuality should not be a criminal offence. The state laws, however, being based on a male point of view, have historically criminalized homosexuality and continue to prevent equality under the law for homosexuals. MacKinnon argues that because homosexuality violates sexuality from the dominant male point of view that presumes and values a dominant male and a submissive female, laws exist to reaffirm the prevailing heterosexist male idea of sexuality.<sup>32</sup> Also, in considering Devlin’s argument that society’s morals form the laws, one must be sensitive to how different today’s society is, including in relation to its accepting attitude toward homosexuality. The majority no



longer feel “intolerance, indignation, and disgust” towards it, which is perhaps why in many countries it is no longer prohibited.

Similarly, MacKinnon believes that the dominant male standpoint is adopted when it comes to making laws regulating abortion. She disagrees with Devlin that abortion should be criminalized and believes it is a necessary right for women because its availability provides a form of relief from lack of control of conditions under which they become pregnant – conditions that include social pressure, poverty, lack of information, and sexual force. Being based on dominant male standpoints, modern Western laws have traditionally denied women control over sexual access to their bodies and furthered the male pursuit of control over women’s sexuality.<sup>33</sup> To answer the question of why abortion was legalized in the U.S., MacKinnon argues that the availability of abortion increases the availability of intercourse and this is something men desire.<sup>34</sup> Further, the abortion right guaranteed by *Roe v. Wade* was given as a private privilege, not a public right, and this is a feminist concern. Privacy law assumes women are equal to men in private, yet it protects battery, marital rape, and domestic exploitation, thereby playing a big role in the subordination of women. The privacy doctrine “isolates women... from each other and from public resource” and it reaffirms and reinforces the public-private split, a major critique for feminism.<sup>35</sup> Therefore, MacKinnon argues that the U.S. abortion law simply reinforced the division between private and public, further codifying the male point of view and women’s inequality.<sup>36</sup>

One issue on which Devlin and MacKinnon agree is that pornography should be prohibited. However, they justify this prohibition differently. Devlin, as mentioned, believes it should be prohibited because it corrupts others and public morality condemns it. MacKinnon, however, believes that pornography should be prohibited because it sexualizes and institutionalizes inequality and because the violence against women in pornography normalizes and reinforces gender hierarchy.<sup>37</sup> Not all sexual material, as MacKinnon clarifies, is pornography; it must be “graphic and sexually explicit and subordinate women” to be considered pornography.<sup>38</sup> According to MacKinnon, pornography furthers sexual inequality in many ways. She argues that it combines the social idea of maleness with erotic dominance and the social idea of femaleness with erotic submission, thus turning women into accessible sexual objects.<sup>39</sup> It harms women by making them sexual property, humiliating and silencing them, and by lowering the public standard of their treatment.<sup>40</sup> Women used in pornography experience rape, battery, sexual harassment, and loss of self-esteem, among other things.<sup>41</sup> Viewers may become desensitized to pornography and internalize this sexual hierarchy, thus becoming or remaining unable to relate to women on an equal level, and may be more likely to discriminate against them.<sup>42</sup> MacKinnon provides social studies and controlled experiments as evidence of the harm pornography perpetuates. These studies support the conclusion that “exposure to pornography increases attitudes and behaviours of aggression and discrimination” against women, and causes “increased acceptance of rape myths, desensitization to sexual force, and spontaneous rape-fantasy generation.”<sup>43</sup>

Despite the inequality and harm perpetuated by pornography, MacKinnon claims it is protected by the law, since laws are written from a dominant male perspective. According to feminists, the obscenity law in the U.S. is concerned with morality from a dominant male point of view, and this law condemns nudity, explicitness, arousal, and unnaturalness. But these modes of representation do very little harm, argues MacKinnon, because the real damage to society comes from forced sex, subordination, coercion, and rape.<sup>44</sup> In 1973, following the ruling of *Miller v. California*, obscenity under law came to mean what the “average person applying contemporary community standards” understands to be offensive sexual conduct.<sup>45</sup> Thus, the obscenity law considers harm done to the social interest and to morality, as Devlin would recommend, but not harm done to women in particular.<sup>46</sup> The First Amendment, according to MacKinnon, protects most pornography from restriction and thus protects the status quo.<sup>47</sup> It furthers the idea that free speech helps discover truth and protect diverging ideologies, yet it fails to realize that pornography is actually part of the ruling ideology and feminism is the dissenting ideology.<sup>48</sup> Alongside the free speech granted to men by the First Amendment, pornography takes away the free speech of women by enslaving their minds and bodies and coercing them into silence, thus silencing the women’s point of view.<sup>49</sup> Therefore, according to MacKinnon, the First Amendment and the

obscenity law simply further entrench a dominant male point of view and are just more legal documents written by men to turn the practice of sex discrimination into a legal right.<sup>50</sup>

Further criticisms of Devlin's theories of law and morality can be found in the writings of legal philosophers H.L.A. Hart and Ronald Dworkin. Hart criticizes Devlin's social cohesion argument because he argues that the test of "intolerance, indignation, and disgust" would justify segregation and witch-hunting in racist and misogynistic societies.<sup>51</sup> Also, Hart feels that society does not necessarily have a shared morality in Devlin's sense, and requires only a minimum of laws restricting things such as violence, theft, and deception. Further, the preservation of morality is not necessary for the survival of society as a change in morality could even be beneficial to a society.<sup>52</sup> One possible reply from Devlin would be that allowing some moralities might lead to a slippery slope allowing people to decide for themselves which laws to obey and which to ignore, which would be disastrous for society.<sup>53</sup> [Oops! Don't cut out the footnote. I didn't mean to scratch it out.]

Dworkin does not disagree with Devlin's idea that a shared morality is necessary for the survival of society. Where Dworkin and Devlin differ most is in Dworkin's argument that the state does not have the right to use law to enforce matters of morality and in what counts as a society's morality.<sup>54</sup> He argues that the reasons provided to form a society's morality must not be based on prejudice, aversion, implausible propositions of fact, repetition of other's opinions, or emotional reactions because consensus on morality is not based on what people feel at a certain point in time.<sup>55</sup> Also, Dworkin argues that Devlin is at fault for relying on the anthropological moral position rather than the critical, which is based on feelings rather than reasoning.<sup>56</sup>

MacKinnon is also not immune to critique, and Dworkin raises two issues regarding the prohibition of pornography. Dworkin agrees that much of pornography is demeaning, but he does not think it should be prohibited. Firstly, Dworkin argues while there is some evidence pointing to a weakened critical attitude towards sexual violence after exposure to pornography, there is no causal evidence that pornography causes more violent incidents.<sup>57</sup> However, MacKinnon's response is that violence against women exists due to the demeaning attitudes towards them. Therefore, if exposure to pornography increases discriminatory attitudes, as she argues is proven, it only follows that exposure to pornography will increase violent forms of discrimination against women as well. Even if what Dworkin says is true, simply because there is no direct causal isolated proof does not mean there is no harm. She claims that Dworkin's argument is a linear, exclusive and isolated conception of harm. Pornography does not target women in that way, but rather attacks women as a whole. Not being able to isolate causal evidence actually supports and reinforces her concern that the harm is so pervasive it cannot be sufficiently isolated.<sup>58</sup>

Secondly, Dworkin believes that censoring free speech to resolve a degrading attitude towards women would be undemocratic. He argues that it would be unconstitutional to ban pornography because the First Amendment protects free speech and allows the endorsement of the inferiority of a particular group even if it contributes to an unequal social structure.<sup>59</sup> He believes that offensiveness cannot be a "sufficient reason for banning without destroying the principle that the speech we hate is as much entitled to protection as any other."<sup>60</sup> MacKinnon's reply to this is that preventing harm to women caused by pornography is more important than protecting pornography as speech. Since the Fourteenth Amendment calls for equality under the law while the First Amendment protects discriminatory activity, MacKinnon argues that courts should look to the Fourteenth and not the First Amendment when it comes to pornography.<sup>61</sup> She argues that speech which promotes prejudice, disadvantage, subordination, and stereotyping of unequal and historically disadvantaged groups is powerful and shapes their social image, which then controls their access to resources and opportunities.<sup>62</sup> Allowing pornography to be protected as free speech under the First Amendment also allows for unequal opportunities and representation, which is inconsistent with the Fourteenth Amendment.

Devlin's position stems from the idea of social cohesion and the right of society to use law to intervene in matters of private morality. In conclusion, this paper takes the position that MacKinnon's radical feminist theory, which claims that society's laws and morals are created from a dominant male point of view, is more convincing and realistic. MacKinnon argues that Devlin's theory that society has a

shared morality which is discovered through consulting a “reasonable man” is flawed because in reality society’s morality is dominated by a hegemonic male ideal, shaping society’s laws from a male point of view. Through laws regulating homosexuality, abortion, and pornography, MacKinnon effectively exposes that the law engages in sex inequality due to its male standpoint. Hart and Dworkin further challenge Devlin’s theory by questioning whether a shared morality is necessary and whether it is possible to discover what society’s morality is, among other things. Furthermore, while Dworkin’s challenges to MacKinnon’s theory are noteworthy, they do not overturn her hypotheses and she provides adequate responses to keep her theory afloat. MacKinnon’s radical feminist theory on law and morality remains sound and paints an unflattering picture of inequality issues facing contemporary society.

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<sup>1</sup> Martin Michael, *The Legal Philosophy of H.L.A. Hart: A Critical Appraisal*. (Philadelphia: Temple University Press, 1987), 240.

<sup>2</sup> Patrick Devlin, *The Enforcement of Morals*. (Oxford: University Press, 1965), 2.

<sup>3</sup> Devlin. *The Enforcement of Morals*. 2-3.

<sup>4</sup> J.W. Harris, *Legal Philosophies*. 2nd ed. (Oxford: University Press, 2004), 133, 138.

<sup>5</sup> Devlin. *The Enforcement of Morals*. 10.

<sup>6</sup> Ibid., 7, 111.

<sup>7</sup> Harris. *Legal Philosophies*. 138.

<sup>8</sup> Devlin. *The Enforcement of Morals*. ix-x.

<sup>9</sup> Devlin. *The Enforcement of Morals*. v, 16.

<sup>10</sup> Ibid., 17.

<sup>11</sup> Ibid., 15.

<sup>12</sup> Ibid., 4, 7, 94.

<sup>13</sup> Ibid., v.

<sup>14</sup> Ibid., 8.

<sup>15</sup> Michael. *The Legal Philosophy of H.L.A. Hart*. 263, 244.

<sup>16</sup> Michael. *The Legal Philosophy of H.L.A. Hart*. 263.

<sup>17</sup> Catharine MacKinnon, *Toward a Feminist Theory of State*. (Harvard: University Press, 1989), 37, 41.

<sup>18</sup> Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law*. (Harvard: University Press, 1987), 50.

<sup>19</sup> Catharine MacKinnon, *Women’s Lives, Men’s Laws*. (Harvard: University Press, 2005), 311.

<sup>20</sup> MacKinnon. *Feminism Unmodified*. 131.

<sup>21</sup> MacKinnon. *Toward a Feminist Theory of State*. 3, 130.

<sup>22</sup> MacKinnon. *Feminism Unmodified*. 6-7.

<sup>23</sup> MacKinnon. *Toward a Feminist Theory of State*. 128.

<sup>24</sup> Ibid., 46.

<sup>25</sup> Ibid., 112.

<sup>26</sup> Ibid., 237.

<sup>27</sup> Ibid., 238.

<sup>28</sup> MacKinnon. *Women’s Lives, Men’s Laws*. 103.

<sup>29</sup> MacKinnon. *Toward a Feminist Theory of State*. 163.

<sup>30</sup> Ibid., 169.

<sup>31</sup> Ibid., 161-3.

<sup>32</sup> Ibid., 110.

<sup>33</sup> MacKinnon. *Toward a Feminist Theory of State*. 246.

<sup>34</sup> Ibid., 188.

<sup>35</sup> Ibid., 194.

<sup>36</sup> Ibid., 192-194.

<sup>37</sup> MacKinnon. *Toward a Feminist Theory of State*. 143.

<sup>38</sup> MacKinnon. *Women’s Lives, Men’s Laws*. 305.

<sup>39</sup> MacKinnon. *Feminism Unmodified*. 148.

<sup>40</sup> MacKinnon. *Women’s Lives, Men’s Laws*. 317.

<sup>41</sup> Ibid., 313.

<sup>42</sup> MacKinnon. *Feminism Unmodified*. 187, 189.

<sup>43</sup> MacKinnon. *Women’s Lives, Men’s Laws*. 302-3.

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- <sup>44</sup> MacKinnon. *Toward a Feminist Theory of State*. 196. FU, 147-8
- <sup>45</sup> MacKinnon. *Feminism Unmodified*. 152.
- <sup>46</sup> Ibid., 186; MacKinnon. "Only Words," in *Law and Morality*. 950.
- <sup>47</sup> MacKinnon. *Women's Lives, Men's Laws*. 306.
- <sup>48</sup> MacKinnon. *Feminism Unmodified*. 155-6.
- <sup>49</sup> MacKinnon. *Toward a Feminist Theory of State*. 205.
- <sup>50</sup> MacKinnon. *Feminism Unmodified*. 3.
- <sup>51</sup> Michael. *The Legal Philosophy of H.L.A. Hart*. 250.
- <sup>52</sup> Harris. *Legal Philosophies*. 140.
- <sup>53</sup> Ibid., 142.
- <sup>54</sup> Stephen Guest, Ronald Dworkin, *Jurists: Profiles in Legal Theory*. (Edinburgh: University Press, 1997), 111-2.
- <sup>55</sup> Ibid., 112.
- <sup>56</sup> Ibid., 111.
- <sup>57</sup> Ronald Dworkin, "Liberty and Moralism," in *Law and Morality, Readings in Legal Philosophy*. (Toronto: University Press, 2007), 965.
- <sup>58</sup> MacKinnon. *Toward a Feminist Theory of State*. p.207-8.
- <sup>59</sup> Dworkin. "Liberty and Moralism," in *Law and Morality*. 965.
- <sup>60</sup> Ibid., 964.
- <sup>61</sup> Catharine MacKinnon, "Only Words," in *Law and Morality, Readings in Legal Philosophy*. (Toronto: University Press, 2007), 952.
- <sup>62</sup> MacKinnon, "Only Words," in *Law and Morality*. 953.



## Racism Without Races: Analyzing France's Color-Blind Politics

Sheena Bell

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.

Article One of the Constitution of the Fifth Republic

To be French, you need to earn it

Front National Slogan<sup>1</sup>

How can France, the land of the 'Rights of Man,' be also home to some of the most salient racial inequalities in the developed world? Only a few months ago Val d'Oise, a Paris suburb largely populated by immigrants, erupted in riots and anti-police demonstrations.<sup>2</sup> Although not at the same scale, this riot was strikingly similar to the three-week long *crise des banlieues* which brought unprecedented international and domestic attention to the plight of immigrants and their children in France's poor neighbourhoods.<sup>3</sup> Many immigrants, particularly of Maghrebi or African descent, complain of increasing marginalization and racism from mainstream French society. This claim may seem strange, given that France strictly has a color-blind policy and does not officially recognize 'race.' The French approach to addressing societal inequalities contrasts with the American model, which is distinctly more 'color-conscious.'

Upon first glance, the policies, perceptions and history of 'race' in these two nations contrast remarkably. France is part of the 'old world' and was heavily involved in colonialism, while the United States is seen as an 'immigrant nation' and slavery in the domestic context was integral to its early formation. However upon deeper examination, the French case shows many striking parallels to the portrayal of the United States in Joel Olson's book *The Abolition of White Democracy*. Olson explores the history of slavery and segregation in the U.S. and argues that "American citizenship is a form of racial privilege in which whites are equal to each other but superior to everyone else."<sup>4</sup> I will highlight four parallels between the French and American cases. First, France has a very 'race-like' conception of culture; the French distinction of French/Non-European is very similar to the white/non-white binary Olson depicts in the American context. Second, the inclusion of Eastern Europeans into the French

identity is similar to groups such as the Irish who had to 'earn their whiteness' in order to be accepted into mainstream society. Third, I observe distinct 'wages of Frenchness' which unite a kind of cross-class alliance which serves to protect the privileges of being French from 'others.' Lastly, focusing on two specific cases, the Antilleans and the *beurs*, second generation Maghrebi youth, I will contend that these groups have developed a 'double consciousness,' a concept articulated by W.E.B. du Bois that I borrow from Olson's work.<sup>5</sup> I will explain each of these concepts in turn and show that Olson's framework is highly illuminating when applied to the French 'racism without races.'

While the continued relevance of race is clearer when discussing the United States, France's current colour-blind stance obscures the racism in its past and present. In order to compare the French and American cases, it is important to briefly outline the role race and discrimination have played in French history. Erich Bleich argues that there is a tendency to oversimplify the anti-race legacy of French history. France's founding republican and Jacobin nationalisms are often claimed to be universal; however, as Miriam Feldblum argues, "it is possible to say that French nationalism has essentially a culture of exclusion" as "exclusion, assimilation, and defense against otherness are properties of both nationalisms."<sup>6</sup> Furthermore, a selective memory often obfuscates France's experience with colonialism. For French scholar Yvonne Yazbeck Haddad, colonialism is still enormously relevant to French identity today. *La mission civilisatrice*, the French 'white man's burden,' is the idea that French culture is inherently superior and, thus, the nation must 'civilize' other, lesser cultures. Yazbeck writes that this mission "still influences French policy toward its immigrants today: rather than accept cultural differences, the French government demands that all its citizens adhere to a rigid and exclusive 'French' identity."<sup>7</sup> In the current context, racism in France has been connected with Jean-Marie Le Pen's extreme right-wing nationalist party, the *Front National*. Outwardly racist, Le Pen has argued that increased numbers of non-European immigrants are "a true invasion that is in the process of making the French nation disappear before the next twenty years."<sup>8</sup> However, as we will see, Le Pen's racism is symptomatic of a more mainstream current of discrimination and racialization in France today.

Officially, France is a color-blind state that avoids the term 'race,' favouring policies and discourses that address culture, class, geography or citizenship status instead. Certain laws are in place to prevent racist acts, including the 1972 law to ban discrimination and racist acts in private and public life, as well as the 1990 Gaysott law which toughened penalties against racists. This law also prohibited convicted racists from taking public office.<sup>9</sup>

France was enormously affected by the manipulation of race against Jews in WWII. French scholars and officials argue that to make racial distinctions is to reinforce difference and therefore the possibility of exclusion. Dominique Schnapper, an influential French scholar, argues that the use of 'ethnic groups' is an "unacceptable Americanism."<sup>10</sup> The French perspective is embodied in Jean-Paul Sartre's characterization of the 'Democrat,' who believes "Jews, Chinese, Negroes ought to have the same rights as other members of society, but he demands those rights for them as men, not as concrete and individual products of society."<sup>11</sup> However, Silverman argues that this paradigm marginalizes the specific differences of immigrants, rendering them "ethnically invisible, or at least, silent."<sup>12</sup> Olson makes a similar critique of color-blind policies, arguing that in erasing the concept of race, one does not erase the race-based power relations behind it. For him, "whiteness in the color-blind state functions as a norm in which racial privilege is sedimented into the background of social life as the 'natural outcome' of ordinary practices and individual choices."<sup>13</sup> Similarly in France, racism exists without the concept of 'race.'

The taboo on race extends further: in 1978 France passed a law that made it illegal to conduct research based on markers of race or ethnicity. Therefore, statistics on race and ethnicity are nearly non-existent in France. In his book, Olson argues that statistics can act to normalize the privileges of whiteness, because if there is no explicit preferential treatment by the state, the disproportionately high well-being of white people can be seen as natural. Whereas in the U.S. the use of race-based research can demonstrate quite clearly the disparities between whites and blacks, France's law against such research prevents a more precise understanding of exactly how different groups are marginalized. However, French scholars have argued that categorizing society into races or ethnic groups is unnecessary and

divisive. Whereas the American approach can be characterized by ‘the truth shall make you free,’ French critics worry that ‘the numbers will be abused.’<sup>14</sup> However, Olson’s claim is compelling. Race-based study may expose, not create, the existence of the statistical advantage enjoyed by white French people in areas such as income, employment and health. Moreover if racist behavior marginalizes certain groups, then research that does not take into account the particularities of these groups cannot accurately address their concerns.

If neither ‘race’ nor ‘ethnic group’ are used in France, along what lines does racism take place? During colonialism, the *mission civilisatrice* emphasized the role of culture as essential to French identity. Yet, as David Beriss maintains, “the manner in which culture is understood in France resembles in many ways the biological determinism characteristic of the American conception of race.”<sup>15</sup> Inherent in racism is a belief that phenotype is a marker for innate intellectual and moral capacity, talent and behaviour. Thus, racists order races according to their supposed value. Etienne Balibar argues that this biologically-motivated, hierarchized process continues today in France under the banner of ‘culture.’ He calls this ‘differentialist racism,’ in which individuals are seen as exclusive bearers of a single culture and in turn certain cultures are viewed as obstacles to the acquisition of the superior French culture.<sup>16</sup> According to this notion, cultures are generally thought to be contained within the borders of nation-states. People with these undesirable, ‘unassimilable’ cultures, in this view, will dilute the French identity. This argument posits itself as the ‘new anti-racism,’ because its proponents claim to ‘respect’ different cultures but believe that each culture should preserve its identity by not ‘mixing.’ Jean-Marie Le Pen is a vociferous advocate of this argument; however as we will see, this argument infiltrates more subtly into mainstream discourses and policies.

The emphasis on culture has made French nationality and citizenship intimately related. Olson portrays the United States’ nation-building project as dependent on the idea of citizenship as whiteness. In fact, “for most of American history, to be a citizen was to be white” and a non-citizen was to be black, or another non-white group, such as South Asian.<sup>17</sup> This delineation was explicitly race-centric; yet, as I have argued, French racial discrimination manifests on cultural lines. The French notion of citizenship relies more on a notion of ‘culture,’ which is conceived today as bound by nation-states. In the modern context, this is generally reminiscent of nationality. Alec Hargreaves states that “in the post-colonial period, French nationality and citizenship have formed a virtually indissoluble whole.”<sup>18</sup> For Olson, citizenship is a social status which is essential neither because of the political powers nor the equality of rights it confers, as “it is the distinction between citizen and non-citizen that matters.”<sup>19</sup> Citizenship debates in France are strikingly similar: “more than in any other European polity, therefore, citizenship struggles in France have been starkly defined in terms of the meaning of *national identity*, *national community*, and subsequently, *national integration*.”<sup>20</sup> The fact that citizenship of Muslims, for example, is causing a kind of ‘identity crisis’ in France indicates the extent to which French citizenship is linked to a certain imagined community and history which is exclusive of certain groups.

In post-colonial France, the ‘other’ or what Olson calls the ‘anti-citizen’ is the visibly different non-European. Georg Hegel’s *Phenomenology of Spirit* explains how identities are created through social interaction: a person or a group differentiates oneself by having an ‘other.’<sup>21</sup> The ‘other’ both threatens and reinforces the identity of a group. Olson draws upon W.E.B DuBois in arguing a theory of race that has two categories: white and non-white, “both of which are filled by a dynamic and varying selection of ethnic and social groups throughout history.”<sup>22</sup> In the U.S., he argues that Blacks and whatever other groups also fell into the non-white category at that time, were seen as the anti-citizens. In the French context, the ‘other’ is increasingly the non-European. Although this distinction is based on culture, it shows evidence of racism. For example, Hargreaves notes that returned *pièds-noirs*, former French citizens who lived in Algeria, have never been treated as immigrants. Contrast this with the experience of those from the *Départements et Territoires d’Outre Mer*, France’s offshore territories, who are often as similar in culture but are “easily recognizable by virtue of their somatic features as originating outside France.”<sup>23</sup> These full French citizens are often treated in public discourse as immigrants in a way the *pièds-noirs* are not. Beriss argues that the non-European is “seen as not really ‘having’ a culture but, instead, as being had by culture.”<sup>24</sup> But that culture also has racial implications, such that “color does

serve as a marker of difference, of non-Frenchness.”<sup>25</sup> Similarly, Himani Bannerji has argued that French identity, like all European nationalities, serves “as a metaphor for whiteness.”<sup>26</sup> Therefore, the exclusion of non-European cultures, which are seen as lacking in the appreciation and promotion of individual enterprise, social and political individualism, take on racial dimensions.<sup>27</sup>

Critical to Olson’s argument is that white privilege, or the ‘wages of whiteness,’ in the U.S. is protected by a cross-class alliance of whites. Whiteness is a privilege, with entails certain unearned advantages such as preferential treatment in employment and politics. Olson gives examples in the American case of how white laborers work against their class interests in order to protect the ‘wages of whiteness.’ Thus, whiteness transcends class interests in the interest of protecting their privilege from non-whites. In France, there is evidence of a similar cross-class alliance. Silverman notes the “cross-cutting tendencies” regarding “the attention to nation, national identity, and culture-based conceptions of citizenship” in France.<sup>28</sup> For example, in the last Presidential election, both frontrunners brought national identity, usually the terrain of the Front National, to the fore of the debate. Nicolas Sarkozy called for a Ministry of Immigration and National Identity “that would require newcomers to embrace the secular values of the republican state” and his rival, leftist Ségolène Royal, promised to ensure that all French persons knew the patriotic song *La Marseillaise* and had a French flag to display on Bastille Day.<sup>29</sup> This suggests that certain identity interests cut across political lines. Further evidence for a cross-class alliance is found in employment, where the influential French NGO SOS Racisme has found that employers frequently reject CVs with foreign, especially Maghrebi and African names.<sup>30</sup> Obviously, this stands in opposition to the view of hiring the best qualified applicant, which would be in the best interests of the employer. As Olson writes, this rejection signifies an allegiance greater than individual economic interest; namely, solidarity with a certain conception of identity and Frenchness. Many observers have also noted that France lacks non-white public figures, such as TV newscasters, high-level politicians and public officials. This cross-class alliance demonstrates why “even if the nationalisms of the Right and Left diverge upon certain crucial points they merge together in a common defense of the French nation, partially occupied and threatened by the foreigner.”<sup>31</sup>

Over the 20<sup>th</sup> century, the definitions of who can be French have shifted and some of those formerly discriminated against have been incorporated into the French identity, shifting the ‘other’ towards non-Europeans. In the early 20<sup>th</sup> century, the reconstruction of France after the First and Second World War created a huge demand for immigrant labour. There was much documented racial violence between these Italian, Portuguese, and Eastern European groups and the French majority.<sup>32</sup> However, questions about their capacity to integrate have been replaced by a new concern with Muslim and African immigrants. Olson writes of a similar process that unfolded in the United States. Groups such as the Irish were not seen as ‘white’ or assimilable in early American history. However, the Irish ‘earned their whiteness’ by distinguishing themselves from blacks, often through participation in racist acts. This phenomena described by Olson is highly reminiscent of the French case. The idea of ‘earning’ whiteness is echoed in the Front National slogan: “to be French, you need to earn it.”<sup>33</sup>

An example of someone who has worked to ‘earn his Frenchness’ is Nicolas Sarkozy, the current President of France. A son of a Hungarian immigrant, his stance on immigration has been very strict. His infamous response to the Paris riots in 2005 was to *nettoyer les banlieues au Kärcher* (clean the suburbs with water hoses); as well, he called immigrants’ children *racaille* (scum, but with racial connotations). His immigration policies first as Interior Minister, then as President, have called for mandatory acquisition of basic French language and culture and high skill levels from immigrants. Therefore, many prospective African and Middle Eastern nations will be disproportionately hurt by these policies, as many prospective emigrants from these areas seek to enter France to work low-paying, low-skilled positions.

At first glance it seems paradoxical that the son of an immigrant could be so nationalistic and austere regarding immigration; however, it can be argued that partially motivating Sarkozy is a desire to ‘earn his Frenchness.’ The phrasing of his autobiography on his personal website is particularly telling, in that he was born “of a French mother and a father who chose France as his country, Hungary, had been invaded by Communist Russia...My family taught me the values of *gaullisme*.”<sup>34</sup> Firstly, he writes of his Hungarian father before his mother, who Sarkozy explains ‘chose France,’ rather than simply saying he



was an immigrant. In fact, the word immigrant is never used. Secondly, his emphasis on learning the values of *gaullisme* demonstrates his capacity to assimilate into French culture. His hard stance on immigration and his strongly nationalistic approach serve to lessen suspicions of his foreign background. Nicolas Sarkozy, then, is considered French, in a way that the new non-French, Maghrebis and Africans, are not.

In order to see how racism in France affects minority groups, the Antilleans are a particularly good choice because their French citizenship and assimilation of French culture have made them, as Frantz Fanon wrote, 'more civilized' than other colonial peoples, such as African Blacks. The Antilleans represent a group which meets the three criteria most lauded by nationalists: acquisition of French citizenship, language and culture. However, Beriss notes that in France people initially treat Antilleans as foreigners, based on their skin color. This attitude tends to change quickly once a person realizes that they are Antillean.<sup>35</sup> This 'double status' reflects the role that phenotype and judgement based on race pervades French social relations.

Antilleans are burdened with the ambiguous identity of being French citizens, "as members of a visible minority, they may be viewed as black, Third World, and therefore, not French."<sup>36</sup> Paul Gilroy has written that to be both Black and European requires some sort of double consciousness.<sup>37</sup> The double consciousness is a concept developed by W.E.B. du Bois. In Olson's work, it implies a "paradoxical sensation that results from being Black and American in a society that makes these identities contradictory rather than complementary."<sup>38</sup> Similarly we see in the French case that the Antilleans have this double identity which is inherently contradictory. Frantz Fanon wrote extensively about the psychological impacts of being Antillean in a French world. He cites the story of an Antillean man who had lived his entire life in Bordeaux, and yet he was never seen as 'French enough' not 'Antillean enough' to truly belong in one country or the other.<sup>39</sup>

This inability to be accepted as French relates to the case of the *beurs*, second-generation Maghrebi youth. The word *beur* comes from a French cultural practice of *verlan*, in which words are inversed to form new ones. *Beur* is a variation of *arabe*, but specifically denoting second-generation immigrants. Inherent in the term is the idea that even though these youth have been born and raised in France, they still retain their parent's culture. Similarly to the Antillean in Fanon's story, they are assumed to identify with their 'culture,' instead of French. It is often the *beurs* who face discrimination and yet "cannot protest by 'returning home,' as instructed by the rhetoric of the extreme right."<sup>40</sup> Marginalized, yet with no recourse or other options, many *beurs*, as well as third- and fourth-generation 'young ethnics' took part in the protests, violent or non-violent during the Paris riots in 2005 and 2007. Their predicament demonstrates the racially-motivated discrimination that prevails in France under the banner of 'culture.'

What can be done to lessen the discrimination against non-Europeans in France? Olson's solution for the United States is the abolition of whiteness, in name and privilege. This is obviously both radical and ambitious. However, in the French case, I argue that whiteness and Frenchness have become intertwined. Thus one cannot clearly call for the abolition of Frenchness, but perhaps its radical re-definition.

Nancy Fraser argues that there are two types of remedies for addressing inequalities: affirmative, which use the welfare state in policies such as affirmative action and income transfers; and transformative, which work to destabilize the structures that perpetuate inequality. The re-working of the meaning of "French" is a transformative remedy for inequality that implies a restructuring of ideologies such as French nationalism and institutions such as race-blind policies. In this restructuring, the associations between whiteness and Frenchness need to be severed in order to truly facilitate the integration and acceptance of Maghrebi and African French citizens into society. Essential for this process is the political and economic empowerment of heretofore marginalized groups. The reoccurrence of the Paris suburbs riots underscores the continuing need for real change. As Yazbeck argues, "despite the international attention that the 2005 riots attracted, it is unlikely that societal conditions will improve for third- and fourth generation immigrants without a radical departure from current and historical French immigration and assimilation policies."<sup>41</sup>

Although Olson's radical solution of abolishing whiteness may not be immediately feasible in the French case, his articulation of concepts such as cross-class alliance and the wages of whiteness, the double consciousness and citizenship and the anti-citizen provide an innovative perspective in current French social politics. His framework helps to explain how discrimination continues in a 'race-blind' France, and how it has embedded itself into French identity discourse and politics. Furthermore, the lens of the double consciousness reflects the situation of both *beurs* and Antilleans. In considering French identity, many scholars and observers have asked: Are French people white?<sup>42</sup> A comparison of Olson's portrayal of the United States with the discrimination prevalent in France today provides a persuasive affirmative answer to the question.

<sup>1</sup> Maxim Silverman, *Deconstructing the Nation: Immigration, Racism and Citizenship in Modern France*, (New York: Routledge, 1992): 57.

<sup>2</sup> Elaine Sciolino, "In French Suburbs, Same Rage, but New Tactics." *New York Times*. 27 Nov 2007.

<sup>3</sup> *Crise des banlieues* is a French expression that encompasses the wide-spread riots and protest that occurred after two youth, hiding to avoid the police, died in a power substation.

<sup>4</sup> Joel Olson, *The Abolition of White Democracy*. (Minneapolis: University of Minnesota Press, 2004): book cover.

<sup>5</sup> W.E.B. du Bois was an African-American author who wrote at the turn of the century on questions of race and identity particularly related to the state of African-Americans in the United States.

<sup>6</sup> Miriam Feldblum, *Reconstructing Citizenship: The Politics of Nationality Reform and Immigration in Contemporary France*, (Albany: State University of New York Press, 1999): 73.

<sup>7</sup> Yvonne Yazbeck Haddad and Michael J Balz, "The October Riots in France: A Failed Immigration Policy of the Empire Strikes Back?" *International Migration* 44 (2): 1.

<sup>8</sup> Qtd. In Silverman, 37.

<sup>9</sup> Erik Bleich, "Anti-Racism without Races: Politics and Policy in a Color-Blind State," in Chapman, Herrick and Laura L. Frader, eds. *Race in France: Interdisciplinary Perspective on the Politics of Difference*. (New York: Berghahn Books, 2004): 165-166.

<sup>10</sup> Alec Hargreaves, *Immigration, 'race' and ethnicity in contemporary France*, (New York: Routledge, 1995): 2.

<sup>11</sup> Jean-Paul Sartre, *Anti-Semite and Jew* (Schocken: Reissue edition April 1995): 117.

<sup>12</sup> Silverman, 132.

<sup>13</sup> Olson, 74.

<sup>14</sup> Adapted from a quote in Neil Bissoondath, *Selling Illusions: The Cult of Multiculturalism in Canada*, (Toronto: Penguin, 1994): 92.

<sup>15</sup> David Beriss, "Culture as Race or Culture as Culture" in in Chapman, Herrick and Laura L. Frader, eds. *Race in France: Interdisciplinary Perspective on the Politics of Difference*. (New York: Berghahn Books, 2004): 123.

<sup>16</sup> Etienne Balibar, Trns. Chris Turner, 'Is There a Neo-Racism?' in Etienne Balibar and Immanuel Wallerstein, 1991, *Race, Nation, Class: Ambiguous Identities*, (New York: Verso) 22.

<sup>17</sup> Olson, xv.

<sup>18</sup> Hargreaves, 167.

<sup>19</sup> Olson, 41.

<sup>20</sup> Silverman, 15.

<sup>21</sup> The 'other' as different from oneself is articulated in Hegel's *Phenomenology of Spirit*. See Miller, A.V. trans., *Phenomenology of Spirit*, (Oxford : Clarendon Press, 1977).

<sup>22</sup> Olson, 25.

<sup>23</sup> Hargreaves, 13.

<sup>24</sup> Beriss, 127.

<sup>25</sup> Beriss, 124.

<sup>26</sup> Himani Bannerji, *The Dark Side of the Nation: Essays on Multiculturalism, Nationalism and Gender*, (Toronto: Canadian Scholars' Press, (2000): 108.

<sup>27</sup> Balibar 25.

<sup>28</sup> Silverman, 2.

<sup>29</sup> Elaine Sciolino, "Tensions Over French Identity Shape Voter Drives." *New York Times*. 30 Mar 2007.

<sup>30</sup> "French Muslims face job discrimination." *BBC News Online*. Available Online.

<sup>31</sup> Silverman, 74.

<sup>32</sup> Yazbeck, 4.

<sup>33</sup> Silverman, 57.

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- <sup>34</sup> My translation. Nicolas Sarkzoy, "Ma Vie," Official Website of Nicolas Sarkozy.
- <sup>35</sup> Beriss, 131.
- <sup>36</sup> Beriss, 118.
- <sup>37</sup> Beriss, 132.
- <sup>38</sup> Olson, 19.
- <sup>39</sup> Franz Fanon, *Black Skin, White Masks* (New York: Grove Press): 64.
- <sup>40</sup> My translation. Raphaël Draï and Jean François Mattéi, eds., *La république brûle-t-elle? Essai sur les violences urbaines françaises*, (Paris : Michalon, 2006) : 149. The full French is : « Ainsi le 'beur' est-il souvent l'arabe décolonisé, mais toujours déclassé, déçu et déchu, de la troisième génération, éprouvant malaise et colère lorsque son CV est rejeté pour des motifs qui lui semblent relever de la pure et simple ségrégation, et qui pour autant ne peut protester en 'retournant chez lui,' comme l'y inscrit la phraséologie de l'extrême droite. »
- <sup>41</sup> Yazbeck, 8.
- <sup>42</sup> Beriss, 111.

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## Play and the Rôle of Ideology

Nate Crompton

By coming to face with the impossible task and the radical openness of the future, play is at once a strategy and a coping mechanism.<sup>1</sup> Anti-capitalism is at times reminiscent of the well-known image of the house cat ‘at play’ with a bear. We know that bears, human beings, and other large adult animals are often reluctant to play. They are often too lazy for games or too serious to play along. While children role-play as animals – indeed for Adorno, their play is an intuitive protest against capitalism<sup>2</sup> – adult humans have a hard time playing or pretending to be another large animal: “although I may imagine that I am a panther while cycling to work, I am hardly in a position to pretend to be one,” said Malcom Bull.<sup>3</sup> The two cyborg exceptions to Bull are 1) capitalists, who play the pig, which is stressed by 2) the late Black Panthers (cycling or not), whose necessary slogan was “Off the pigs!” In the era of late capitalism, we should retain the revolutionary irony of Fred Hampton’s proclamation, “I am the people, I am not the pig!”<sup>4</sup>



### VI

From his extensive work on ideology and ideological state apparatuses, one of Louis Althusser’s formulations was: ‘ideology = *illusion* / *allusion*.’<sup>5</sup> For Althusser, while ideology moves in the realm of illusion, it always refers or alludes to reality, which is one of its strengths. Even while ideology constantly seek to perfect a dogmatic *ideal* (consider an extreme example in the work of Francis Fukuyama<sup>6</sup>), ideology works tirelessly to approximate itself to reality, presenting itself as hard-nosed, ‘pragmatic,’ ‘realistic,’ and ‘empirical.’ Ideology is perhaps illusory in the sense that Winnicott understood the concept of illusion, as “reality-testing.”<sup>7</sup> In fact, Althusser’s conception of ideology is close to the concepts of Winnicott. For Althusser, “Ideology represents the imaginary relationship of individuals to their real conditions of existence,” and for Winnicott, “the task of reality acceptance is never completed [because] no human is free from the strain of relating inner and outer reality...between the subjective object and the object objectively perceived.”<sup>8</sup>

It is on this account that a theory of play can pass through psychoanalysis and “Object Relations theory.” The Object Relations theory of Winnicott and others was in many ways a continuation of the theories of Melanie Klein, particularly her close work with children and their interaction with play-objects. Klein emphasized the psychoanalytic importance of play as an alternative to Freud’s language-centered emphasis on adult verbal expression and free association as means for analysis. For Winnicott and Klein, play is involved in the child’s transition from an early period of “illusion” and “omnipotence”

to a later position in which he/she comes to accept ambiguity, the notion of external objects (what Winnicott called “not-me objects”), and the reality of different objective impurities and contradictions. Initially, the child fails to distinguish between internal and external reality, instead experiencing all phenomena as immanent and whole, perceiving the existence of only wholly consistent objects, either wholly good or wholly bad. Good objects are perceived to be under full subjective control, whereby the child becomes enveloped in his/her own sense of “omnipotence.” Whoever attends closely to the child,<sup>9</sup> (if they attend closely), contributes to the child’s sense of “magical” power over “good objects” in the proximity, such as the mother’s breast. Before the time that there develops an “interplay in the child’s mind of that which is subjective (near-hallucination) and that which is objectively perceived (actual, or shared reality),” there exists a certain “prelogical fusion of subject and object.”<sup>10</sup> Through development, the child experiences a set of anxieties that result from an introduction of objects that carry within them both good and bad elements of reality. According to Object Relations, the child defends against this anxiety by “splitting” the object in order to expel its badness (as a wholly bad part-object) and introject its goodness (as a wholly good part-object). Because objective reality constitutes the self of the child, these defense mechanisms – splitting, introjection, projection – split the ego itself, and thus Melanie Klein termed them the “schizoid mechanisms” of the psyche.<sup>11</sup>

For Winnicott and Klein, normal development brings the child to partly accept the ambiguities of reality and control the schizoid mechanisms. For example, the child comes to accept that contradictory affects and emotions, such as love and hate, are capable of residing in the same object, or of being directed at it. This learning process occurs in a transitional and intermediary space that exists neither strictly within the psyche, nor in an external space. It is a differential, in-between space that Winnicott designates as the ‘*space of play*.’ It is here that the ego’s early defense mechanisms are either repressed or overcome. The child is “weaned” off of his or her illusory magic and learns to use substitutes, part-objects, “not-me” objects and ambiguous objects. This transition does not take place immediately, but requires what Winnicott terms “transitional phenomena” and “transitional objects.” These objects give the child a sense of security, preventing a sense of overwhelming while allowing the child to experience reality. This is to ‘transition’ into reality and do ‘reality-testing.’

In short, the transitional object enables the developmental crucial interplay of conflicting subjective and objective existence. In other words, the transitional object is ambiguous because it both promotes illusion and disillusion.<sup>12</sup> Ideology, too, promotes illusion and allusion, recalling Althusser.

## VII

As subjects of ideology, part of our disavowal of the glaring contradictions in society results from a psychical desire for a return to early omnipotence and primordial union, the desire for non-contradictory objects and pure whole-objects, and our desire not to be overwhelmed by contradictions and antagonisms. But we should be wary that the present analysis has not become a conspiracy against children! When young Edmund “brooks no substitute” for his bottle,<sup>13</sup> we cannot say that he has given a “decisive articulation of the logocentric epoch,” as Derrida said of Rousseau, who wrote: “For me, there has never been an intermediary between everything or nothing.”<sup>14</sup> At the same time, as the *chiasmus* continues to widen – the gap between reality and ideality – ideology forces us into a perpetual child state of transition.<sup>15</sup> It serves to quote Immanuel Wallerstein:

One of the moral justifications of the capitalist world-economy... is that inequalities as exist are transitory and *transitional phenomena* on the road to a more prosperous, more egalitarian future. Here, once again, we have a blatant discord between official ideology and empirical reality.<sup>16</sup>

Given Derrida’s relationship to this psychoanalytic excursion, let us quote from *Specters of Marx*, where Derrida reflected so much on the *chiasmus* opened up by Francis Fukuyama, (“It would be too easy to show, [] measured by the failure to establish liberal democracy, [Fukuyama’s] *gap between fact and ideal*”<sup>17</sup>):

Let us name with a single trait that which could risk making the euphoria of liberal-democratic capitalism resemble the blindest and most delirious of *hallucinations*, or even an increasingly glaring hypocrisy in its formal or juridicist rhetoric of human rights.<sup>18</sup>

Winnicott emphasized the potential “near-hallucinatory” character of psychic subjectivity. Ideology is illusion, or in Winnicottian terms, “magic” and “omnipotence,” and in *Marx*’s terms, “enchantment” and “mystification.”

We are not not reiterating Marx’s notification about the “opiate.” It is difficult to deny when one is conjuring a spirit of Marx. Yet there is a sense in which we need to become cyborgs and engage in Haraway’s “serious play” to keep away from the ‘male territory of Marx.’ Like Marx, Donna Haraway sees the need to overcome a society where “abstraction and illusion rule in knowledge [and] domination rules in practice.”<sup>19</sup> But there is a sense in which Marx seeks an undifferentiated reality, like that space beyond which it becomes so “depressive” for the child to move. Classlessness and the “de-differentiation” of state and civil society – Marx’s appeal in *On the Jewish Question* – can be attained without an overarching primordial harmony. Indeed, this is precisely the move that Haraway makes, whose “cyborg skips the step of original unity.”<sup>20</sup>

## VIII

An original unity has been the yearning of philosophers and cultural critics through all of modernity, like Baudelaire’s notion of the ‘eternal and immutable’ core of ‘modern life’ itself.<sup>21</sup> It is the role of ideology to play down contradictions and set art and culture as potential spaces of harmony rather than of agonism and plurality. Culture, as Winnicott argued, is an “intermediate area...derivative of play...in direct continuity with the play area of the small child.”<sup>22</sup> Culture is the ‘location of play’ and precisely for that reason the site of ideology. Culture is the site for the resolution of the gap, where “relief from the strain [of contradictions, ambiguous objects, etc.] is provided by an intermediate area of experience which is not challenged (arts, religion, etc).”<sup>23</sup> Edmund Burke said long ago that art “is the mediatrix between man and the natural world,”<sup>24</sup> designating art as the ultimate source of social cohesion and harmony. And for Samuel Coleridge it became necessary to find the ‘organic, lost community, the “synthesis of the personality and the collective.”’<sup>25 26</sup> And for Schiller (who wrote in the 15<sup>th</sup> letter of *On the Aesthetic Education of Man*: “Man only plays when in the full meaning of the word he is a man, and he is only completely a man when he plays”),<sup>27</sup> art can take the place of religion as a unifying power in fragmented modern society.<sup>28</sup> Schiller argued that, “the aesthetic creative impulse build[s]...a realm of play and of appearance [that] releases man from all the shackles of circumstance and frees him from everything that may be called constraint, whether physical or moral...[to bring about] harmony in society.”<sup>29</sup>

It is true that Marx’s transition to the classless society passes by way of a duality and not a unity, in the form of the two classes. But as Adorno said, “absolute duality would be unity.”<sup>30</sup> Like Schiller, Burke, Coleridge, and Hegel (whom Judith Butler engages in this penultimate passage), Marx formulated a powerful social narrative partly out of a

metaphysical desire to deny difference through the construction of false and partial worlds which nevertheless appear as absolute.<sup>31</sup>

There exist more contradictions in society than the single contradiction that preoccupied Marx, and not all of them resolve into a formal synthesis (we should include play as among the deepest contradictory elements of society). Thus, to bring to a close what was not meant to be closed, or, perhaps, opened – Haraway outlines feminist socialism in this way:

Irony is about contradictions that do not resolve into larger wholes, even dialectically, about the tension of holding incompatible things together because both are necessary and

true. Irony is about humor and *serious play*. It is also a rhetorical strategy and a political method...At the center of my ironic faith, my blasphemy, is the image of the cyborg.<sup>32</sup>

<sup>1</sup> The article is an excerpt from the unpublished *Play and the Rôle of Ideology: Socialism, 'the ambiguity of play,' and the transitional object of ideology*

<sup>2</sup> The child "sides with use-value against exchange value" when (s)he says, "I am the rhinoceros, and signifies the shape of the rhinoceros." Theodor Adorno, *Minima Moralia: Reflections from Damaged Life* (London; New York: Verso, 1984), p. 228

<sup>3</sup> Malcolm Bull, *Seeing Things Hidden: Apocalypse, Vision and Totality*, (London; New York: Verso, 1999) p. 8

<sup>4</sup> At the same time was Gerry Rubin's Yippee presidential candidate, Pigasus the Pig: "Why vote for half-pigs like Nixon, Wallace and Humphries, when you can have the whole hog? Pigasus."

<sup>5</sup> Louis Althusser, "Ideology and Ideological State Apparatuses" from *The Norton Anthology of Theory and Criticism*, (London; New York: W. W. Norton & Company, 2001) p. 1498

<sup>6</sup> "While some present-day countries might fail to achieve stable liberal-democracy, and other might lapse back into other, more primitive forms of rule like theocracy or military dictatorship, the *ideal* of liberal democracy could not be improved on." (Francis Fukuyama, *End of History and the Last Man* (New York: The Free Press, 1992) p. xi)

<sup>7</sup> Donald W. Winnicott, *Playing and Reality*, (New York: Basic Books, 1971) p. 11

<sup>8</sup> Althusser, "Ideology and Ideological State Apparatuses," p. 1498; Winnicott, *Playing and Reality*, p. 13, 38

(emphasis added).

<sup>9</sup> For Winnicott this is invariably the mother, though not necessarily the biological mother.

<sup>10</sup> *Playing and Reality*, p. 52, 38

<sup>11</sup> Melanie Klein. "Notes on Some Schizoid Mechanisms" from *The Selected Melanie Klein*, ed. Juliet Mitchell. (Penguin Books, 1986) pp. 176 – 200

<sup>12</sup> According to Winnicott, the "good enough mother" should allow for illusion (omnipotent control) and disillusion (weaning). Any disillusion requires that the mother first allow for illusion. (*Playing and Reality*, p. 11)

<sup>13</sup> Winnicott. *Playing and Reality*. p. 42

<sup>14</sup> Jacques Derrida, *Of Grammatology* (Baltimore: Johns Hopkins University Press, 1997). p. 162, 157

<sup>15</sup> See Benjamin R. Barber, *Consumed: How Markets Corrupt Children Infantilize Adults, and Swallow Citizens Whole*, (New York; London: W. W. Norton & Company, 2007) Barber reflects on the consumer culture phenomena of "kidults," "rejuveniles," and "adultescents," all of them trapped by the "infantilist ethos" of the market!

<sup>16</sup> Immanuel Wallerstein, "Culture as the Ideological Battleground of the Modern World-System" from *The Essential Wallerstein*, (New York: The New Press, 2000) p. 282 (emphasis added)

<sup>17</sup> Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of the Mourning, and the New International*, transl. Peggy Kamuf, (New York; London: Routledge, 1994) p. 64 (emphasis added)

<sup>18</sup> p. 80 (emphasis added)

<sup>19</sup> Donna Haraway, "A Manifesto for Cyborgs: Science, Technology, and Socialist Feminism in the 1980s" from *Haraway Reader* (New York: Routledge, 2004) p. 17

<sup>20</sup> Ibid. p. 9

<sup>21</sup> Baudelaire quoted in David Harvey, *The Condition of Postmodernity* (Blackwell Publishing, 1990) p. 10

<sup>22</sup> *Playing and Reality*, p. 102, 13

<sup>23</sup> Ibid. p. 13

<sup>24</sup> Burke quoted in John Hughson, David Inglis, and Marcus Free, *The Uses of Sport: A Critical Study*, (London; New York: Routledge, 2005) p. 9

<sup>25</sup> *The Uses of Sport*, p. 11

<sup>26</sup> Adorno lamented the "ideological overtone of all talk of synthesis." *Negative Dialectics*, p. 175. "Consciousness boasts of uniting what it has arbitrarily divided first, into elements – hence the ideological overtone of all talk of synthesis." In relation to this passage from Adorno, we should note an observation made by Brian Sutton-Smith about festivals. The chaos of the traditional festival can become so overwhelming as to renounce the society, but just as quickly, the festivities re-announces the society. Festival moves from cultural unity to chaos and back to unity – "ambiguity creates the rhetoric, the rhetoric creates the festival, the festival reduces the ambiguity." (*The Ambiguity*

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of Play, p. 110) In the words of Nietzsche, “aye for the game of creating, which is at the same time a game of destroying.” (quoted *ibid.* p. 113). And Deleuze and Guattari’s quote again: “Capitalism continually reterritorializes with one hand what it was deterritorializing with the other.” Is the entire neoliberal project not essentially an effort by corporate and state elites to break what they then claim to have the power to fix (healthcare, education, transit...)?

<sup>27</sup> Friedrich Von Schiller, *Letters Upon the Aesthetic Education of Man*, (Whitefish, MT: Kessinger Publishing, 2004) p. 34

<sup>28</sup> Jurgen Habermas, *The Philosophical Discourse of Modernity: twelve lectures*, transl. F. G. Lawrence (Cambridge, Mass: MIT Press, 1987) p. 45

<sup>29</sup> Schiller quoted in Habermas, p. 48

<sup>30</sup> see T. W. Adorno, *Negative Dialectics*, transl. E. B. Ashton, (New York: The Seabury Press, 1973) p. 174

<sup>31</sup> Judith Butler, *Subjects of Desire: Hegelian Reflections in 20<sup>th</sup> Century France* (New York: Colombia University Press, 1987). p. 97

<sup>32</sup> Donna Haraway, *Manifesto for Cyborgs*, p. 7 (emphasis added)





## **Environment and Society: An Intellectual Mapping of Giorgio Agamben's *Spaces of Exception***

James Gaffney

The dawn of the European Enlightenment, and the scientific and industrial revolutions which followed, challenged many traditional and deeply held assumptions about the world, and produced a variety of competing interests in, and views of, the “natural environment”. Humanity has always had a unique ability to shape its environment. More recently, however, global nature has been remade in problematic ways, and at speeds which our traditional institutions have been unable to effectively deal with. This is a paradigm which is unfolding at multiple scales and in multiple arenas, as “technoscience” begins to impact on everything from the minutia of the genome to the vast expanse of the agricultural landscape.

Like many environmentalists, my heart is often chilled by the icy texture of this scientific materialism, and in times of despair I have submitted to the emotional warmth of poets from a bygone era,

And I have felt  
 A presence that disturbs me with the joy  
 Of elevated thoughts; a sense sublime  
 Of something far more deeply interfused,  
 Whose dwelling is the light of setting suns,  
 And the round ocean and the living air,  
 And the blue sky, and in the mind of man:  
 A motion and a spirit, that impels  
 All thinking things, all objects of thought,  
 And rolls through all things.

William Wordsworth

A century later, Rachel Carson would reflect Wordsworth's romantic view of nature,

There is a symbolic as well as actual beauty in the migration of birds, the ebb and flow of tides, the folded bud ready for spring. There is something infinitely healing in the repeated refrains of nature – the assurance that dawn comes after the night and spring after the winter.

This language serves to underwrite and fuel much of the environmental movement, tugging at human sentimentality and our common appreciation and wonderment of creation. It is a holistic way of experiencing the world, and stands in binary opposition to a science that, by definition, focuses on *parts* of nature (Suzuki 1997: 15). Social constructivists are eager to point out that such binary opposition, which makes nature a “thing” external to human society, is itself a cultural production invested with the language of purity. Although the arguments of social constructivists are important to the ways in which we understand the complexities of knowledge production, they cannot escape the taunts of relativism. For once we acknowledge that nature can never be faithfully reproduced or made transparent, all claims to its inherent value become subjective.

This paper seeks to examine how and why the environment remains a “thing” outside of the law, devoid of legal rights, yet within the realm of anthropocentric prosecution in relation to socio-economic practice and values. The question becomes much more interesting within the context of social constructivism, where arguments that nature and society are intertwined allow me to make the case for extending legal protection to an environment which is merely an extension of a legally regulated society, rather than a pristine and distinct order. Thus I begin the “meat” of my philosophical enquiry with a discussion of social constructivism, and attempt to work through its more troublingly relativist implications. Following this, I discuss the notion of value, arguing that nature has an intrinsic value which should be legally protected. The essay is bookended by Giorgio Agamben's concept of “spaces of exception”, although I do so only briefly on my way to the work of Derek Gregory (2006).

### **Agamben and the State of Exception**

Giorgio Agamben's *Homo Sacer* (1998) has been a groundbreaking piece of scholarship in the humanities and social sciences. In it, he examines the relationship between people and politics; law and human life (Ek 2006: 3), and the ways in which sovereign power can be used to abandon a person outside the sphere of legal protection and thus expose that person to violence (Agamben 1998: 28). Legal abandonment can occur outside or inside the spatial boundaries of sovereign power, or both simultaneously, thereby blurring such a distinction while placing emphasis on the importance of space (Agamben 1998: 26; Gregory 2006). Agamben's work, having been recently translated into English, has been especially relevant in the post-9/11 world, and in the aftermath of Hurricane Katrina (Gregory 2006; Braun and McCarthy 2005). *Homo Sacer*, and the subsequent scholarship it has inspired, requires a

prolonged inspection into the ways in which a “space of exception” can be mobilized in regards to the environment, without straying too far from the original concept. My main departure from Agamben’s work lies in the fact that my object of investigation is not human. Furthermore, the environment, as opposed to the figure of the *homo sacer*, is not subject to the same kinds of sovereign violence. However, the paradoxical relationship involved in a space of exception is a very useful way of registering environmental degradation, and of engaging with social constructivist theory. As I will explain more fully in what follows, the global environment is a “thing” external to society, bereft of legal rights, but subject to anthropocentric legal authority which regulates its consumption.

### Social Constructivism

“Nature is nothing if it is not social” (Smith 1990: 30).

Social constructivists take issue with the notion that nature is external to society. Donna Haraway has asserted that nature “cannot pre-exist its construction” (Haraway 1992: 296), while Bruce Braun (2002: 3) has written that the

Natures we may seek to save, exploit, witness or experience do not lie external to culture and history, but are themselves ‘*artifactual*’: objects made, materially and semiotically, by multiple actors (not all of them human), and through different historical and spatial practices.

These are very important critiques; ones which have shaken the foundation of environmental philosophy. Social constructivism offers many arguments (Demeritt 2002), and for the purposes of this paper, we are concerned with its epistemology, as well as its involvement in debates about nature. According to social constructivism, reality cannot be made wholly transparent; our language, our research, our science is never neutral, but is implicated in the politics of knowledge production (Rorty 1979). Such a concept has tremendous implications for the ways in which society approaches knowledge. Critics argue that, taken to its most nihilistic extreme, all knowledge can be viewed as fallible and incomplete. In other words, if all knowledge is relative to the circumstances of its production, how can society make decisions on issues which require clear and decisive action? Regardless of these debates, social constructivism continues to have many important things to say about the environment, particularly in combating simplistic dualisms of “nature versus culture” in favor of a more intricate ecopolitics which embraces the complex and interwoven flows of power and culture, nature and society, all at varying scales. Braun has been particularly critical of the dualistic rhetoric of environmentalism, a rhetoric invested with what he calls a culturally constructed “language of purity” which is not intellectually neutral.

It is true that within much of the “wilderness” literature, notions of a pristine natural order existing outside the sphere of societal interaction run rampant. For social constructivists, this language is not transparent or naïve. William Cronon (1995: 80), a fierce critic of nature-culture dualisms, wrote that “wilderness [language] embodies a dualistic vision in which the human is entirely outside the natural. If we allow ourselves to believe nature, to be true, must also be wild, then our very presence in nature represents its fall.” For many constructivist scholars (Braun 2002; Harvey 1996; Smith 1996), all discussions of the environment revolve around the concept of “social nature”. The theory of social nature seeks to deconstruct the nature-society dualism and replace it with a more coherent and complex geography that integrates socio-cultural processes. To subscribers of this theory, the spaces of nature and society overlap, and are inseparable from each other. Scholars from varying schools may have no problem agreeing to this. What bothers environmentalists, however, is the notion that since all knowledge is partial, their arguments need not be scientifically disproven, but can be disputed merely because they are “situated knowledges”. Michael Soule and Gary Lease (1995) are two scholars among many to have voiced their concern that social constructivism can be used to justify further tinkering with nature, and that given the dangerous

environmental predicament we are currently faced with, relativist rhetoric needs to be aggressively combated.

Constructivists have fought back against the taunts of relativism (Proctor 1998; Demerit 2005; Geertz 1989). Proctor (1998) has identified two main branches of constructivist apologetics: critical realism and pragmatism. Briefly stated, critical realism attempts to walk a middle ground, asserting that knowledge is neither wholly objective nor subjective, and that all truth is partial (Keat and Urry 1982: 10). This amounts to a weak form of relativism, and has been criticized by postmodernists such as Barnett (1993) who feel that critical realism still overestimates our ability to know reality. Pragmatism, according to Proctor, takes an agnostic stance towards relativism, and often avoids attempts to define truth (Proctor, 17). In the end, Proctor submits to the notion that social constructivism is, by its own definition, open to varying degrees of relativism, but that it can still add to discussions regarding nature.

In trying to map out the intellectual geography of the social constructivist debate, I hope to have made it clear that there remains heated discussion surrounding the subject. I admit to having oversimplified a complex dialogue, with intricacies that far exceed the boundaries of this essay. However, the point is not to provide a complete investigation of social constructivism and its implications, but to provide the philosophical framework with which to discuss the environment as a space of exception. Unfortunately, in trying to make environmental discourse more aware of the ways in which its knowledge is produced, social constructivists have paradoxically muddled the waters, and made environmentalists fearful of the slippery slope toward constructed subjectivity that it produces. This is something that requires attention before we may proceed with a discussion of environmental legal rights.

### **Intrinsic Value**

Value is never found in the object itself...It consists in a relation to an appreciating mind, which satisfies the desires of its will or reacts to feelings of pleasure upon the stimulation of the environment. Take away will and feeling, and there is on such thing as value.

The silence of the desert is without value, until some wanderer finds it lonely and terrifying...until some human finds it sublime, or until it is harnessed to satisfy human needs. Natural substances...are without value until a use is found for them, whereupon their value may increase to any desired degree of preciousness according to the eagerness with which they are coveted.

As we have seen, the position of social constructivism leaves open the perception that nature has subjective value that cannot be wholly understood, inserted into or regulated by anthropocentric institutions. Social constructivists would align themselves with the words of R.B. Perry, believing that since nature is socially produced, its value is dependant upon an anthropocentric experience of it. Thus, we can never assign an ultimate value to an object because assigned values are subjective, and dependant on the context in which the valuation took place, as well as the situated knowledge of the subject who assigns value. Yet, relativism need not be so problematic for radical environmentalists. Indeed, David Suzuki (1999: 16) has turned the whole issue on its head, arguing that because knowledge *is* relative and partial, particularly scientific knowledge, we ought not move any further along an ecologically destructive path which we can never wholly understand,

Over time it has become clear that at every level the effort to know the whole from the parts is doomed. Quantum mechanics has shown us that the position of a particle cannot be defined with absolute certainty. If there is no absolute certainty at the most elementary level, then the notion that the entire universe is understandable and predictable from its components is absurd.

Thus, rather than constructivist relativism being an excuse for continued tampering with the environment, it could just as readily be argued that because nature is indeed so tightly interwoven with human society and because our knowledge and understanding of nature is unavoidably partial, we must therefore be incredibly cautious, both in our treatment of nature and in our very usage of the concept.

However, before assuming that valuation is necessarily subjective, we might benefit from a (re)reading of Kant, whose approach to ethics was based upon a belief that some values are more reasonable than others. Although values may be subjective in terms of perception, according to Kant they can be objective in terms of cognition; therefore values can be either correct or incorrect. This shifts the focus away from *assigning* value to something based on individual perceptions, beliefs and preferences, and towards judging that something either has or doesn't have value. The latter would typically imply cognitive considerations of society as a whole, whereas the former is situated strongly within the desires and situated knowledge of the individual.

It is, therefore, entirely possible to remove the argument from the hopeless intricacies of individual preferences, situatedness and questions of relativism, and fixate it firmly within a discussion of ethical principles. Mark Sagoff (1981) has noted that many of the actions that he engages in are indeed based on subjective wants, and an individual cost-benefit analysis, but that in many instances his individual behavior is in opposition to his "wants" for society at large. Sagoff (1981: 468) refers to this as a "schizophrenic" dialogue between the individual and the citizen:

I speed on the highway; yet I want the police to enforce laws against speeding...I love my car; I hate the bus. Yet I vote for candidates who promise to tax gasoline to pay for public transportation. I send my dues to the Sierra Club to protect areas in Alaska I shall never visit.

According to Sagoff, some values are intrinsic if viewed outside the lens of individual subjective wants, and from the position of society (human and even nonhuman) at large. In other words, if people have no personal interest in the destruction of the rainforest, they would overwhelmingly support its protection due to a belief in the intrinsic value it holds; a belief in "what ought to be" that does not get stuck dealing with the riddles of relativism and subjectivity. Rolston (1982: 79) defines this as "presiding over the fading of subjective value into objective value." For Rolston, things are not individual and disconnected, but "co-fit" into broader natures; "value in itself is smeared out to become value in togetherness."

I hope to have justified my support for the concept of "social nature" put forth by social constructivists; a nature in which the environment is not separate from society, but is inherently tied up with it through cross-cutting flows of knowledge, politics, culture and interaction. I also hope to have established that while relativism may prove problematic for environmental theory, this is only so if looked at from the subject-position of the individual. As Sagoff has convincingly argued, when people remove themselves from utilitarian cost-benefit analysis and subjective desires, and assign value from the position of citizen, we are able to establish objective, intrinsic values. If we accept the vast and convincing arguments that nature does indeed have intrinsic value and that society has moral responsibilities to preserve the environment for future generations (Rolston 1982, 1998; Partridge 1986; Sterba 1998; Golding 1972), then why does the environment remain in a *state of exception*? More specifically, why is it that the natural environment is subject to anthropocentric prosecution in relation to socio-economic value and yet remains a "thing" outside of the law? If nature is mapped onto society, why is society not mapped onto nature? Agamben's theory, as far as I understand it, relates specifically to humans and how they may be made "bare" through a paradoxical state of exception; left without legal rights, but subject to legal prosecution. Surely it is reasonable to take this argument into the realm of environmental philosophy. Yet the reader may ponder why the environment should have rights in the first place?

## Legal Foundations

We should consider that simply because the natural environment does not currently possess legal rights, does not mean it will never or should never enjoy them. Stone (1974) has shown that many persons who now hold rights within our society at one time held none. For example, we have long treated children

as persons even though they were not legally recognized as such until recently. Stone extends this examination towards the non-material, noting that at one time it was inconceivable for a corporation to be legally recognized as a person and yet it is now the case (1974: 240). Stone uses this as a basis to propose that society confer legal rights to “forests, oceans, rivers and other so-called ‘natural objects’ in the environment – indeed, to the natural environment as a whole” (1974: 241).

Critics might argue that natural objects have no right to seek redress on their own behalf because they cannot speak. Yet, as Stone points out, neither do infants, corporations nor incompetents. Rather, lawyers speak for them, and in many instances someone is charged with legal guardianship over that entity. Another objection to bestowing legal rights to natural objects is that they cannot communicate their wants. According to Stone, however, this is not the case. In fact, he asserts, it is far easier for us to know when our lawn needs to be watered than it is for the US Supreme Court to decide whether or not to accept an appeal (1974: 243). Another issue revolves around repayment of damages. If natural objects were given legal rights, how could they be compensated if those rights were ignored? Currently, if two people own property on a stream, under common law the person downstream enjoys “riparian rights” which legally protect the individual from water being polluted upstream. If the water becomes polluted, this person would be able to seek financial redress, as well as clean-up of the river. However, as Stone points out, this type of legal protection is entirely anthropocentric, and ignores the overall damage to the ecosystem which he argues should *itself* have legal rights (1974: 245). If, on the other hand, a forest was entitled to protection under the law and was illegally deforested, it would not only have legal redress to being replanted, but could make a legal claim for damages to the *entire ecosystem*.

### **(Re)inserting Agamben**

Having covered the philosophical framework provided by social constructivism, and argued that natural objects have intrinsic value which should be legally protected, we may now re-insert Agamben into the discussion. The parallels with Agamben’s state of exception are intriguing on several registers, although they do require slight modification. First, rather than dealing with just the relationship between sovereign power and the law, our discussion is more general, focusing on anthropocentric organizations, including legislative and economic institutions. Yet it maintains its ties to Agamben’s theory, primarily due to the power of *bare life* which these institutions wield over the environment. Nature is subject to the legal authority of the state, yet it possesses no rights of its own. Forests are cut down or left standing based, ultimately, upon the decisions of a sovereign, legislative body. Detached from inclusive political space and devoid of legal rights, natural objects find themselves located in a paradoxical space of exception. Therefore, the decisions to allow forests to be logged, or the oceans to be overfished, constitute an act of violence equivocal to Agamben’s “bare life” scenario.

Second, there is a similar mobilization of the “other” (nature) as being existentially different from society. This production of difference often bleeds across social and spatial boundaries to include social groups thought to be too close to nature. An example of this would be the myriad ways in which colonialism produced an archetypal Indian - primitive, threatening, irrational and uncivilized – which implicitly tied First Nations and their natural environment together. Yet it can also simply refer to the nature-culture dualism so despised by social constructivists such as Braun and Castree, since the simplistic representation of complex ecopolitics brought about by the mobilization of binary language allows for much easier implementation of “bare life” upon the environment by the sovereign legislative body.

Unlike Agamben, and perhaps more in line with Derek Gregory’s discussion of Guantanamo Bay (2006), there is a similar resistance to the uses of sovereign and corporate power by social groups from within and outside the state. Braun (2000: 1) describes how the 1993 protest over Clayoquot Sound, British Columbia attracted resistance from diverse social and spatial geographies, importing bodies from France, Germany, Australia and the United States to a site of political struggle.

### **Conclusion**

This essay has attempted to cover an enormous intellectual geography in the span of a few short pages, and is therefore limited in its ability to fully map out the complexities involved. In an attempt to

engage with a theoretically complex issue, I have mobilized many schools of thought, some of which may be seen to contradict each other, and so I will attempt to tie these divergent schools together in my concluding remarks. The central argument of this paper has been that the environment exists in a *state of exception*, subject to anthropocentric institutions, including capitalism and the legal framework through which it operates, but devoid of legal rights. Having drawn upon Giorgio Agamben, it was necessary to establish the existence of a legal paradox similar to the one found in *Bare Life* (1998) and *Spaces of Exception* (2005). Thus, I used social constructivist theory to show that nature and society overlap, and this being the case, I suggested that there existed a similar legal paradox in which nature was subject to the law, but was not protected by it. Furthermore, social constructivism offered an opposition to *bare life* scenarios which “exceptionalize” nature by regarding it as separate from society.

In engaging with social constructivism, however, it was necessary to address the criticism that it promotes a dangerous form of relativism which can be used to deter actions to protect the environment. Therefore, I offered a different philosophical approach, that of Kantian ethics, which was intended to provide support in the debate over relativism. It was not, however, intended to supplant the nature-culture distinction with an objective-subjective distinction. Rather, because social constructivism also opens-up debates about human knowledge which can serve to derail the entire discussion, I offered Kantian ethics as a way of combating relativism while maintaining the importance of the “social nature” concept.

After engaging with these theoretical underpinnings, I proceeded to explained why natural objects should be given legal rights, and then reinserted Giorgio Agamben’s discussion of the sovereign. Critics may charge that it is not the sovereign alone who decides whether forests are cut down or left standing, but that the market plays a significant, or perhaps even a lead role, in the decision. Such an assertion adds even more complexity to the discussion, and would take us outside the confines of this essay, but it certainly deserves careful deliberation. I would suggest that even if we accept a high degree of collusion between the state and the market, it is ultimately the state which has the power to legislate, and which inflicts *bare life* upon the environment. Thus, I believe Agamben’s *space of exception* offers a useful way of think about society’s relationship with the environment, and that in the final analysis, we should endeavor to provide natural objects with legal rights.

“A human being is a part of the whole, called by us Universe, a part limited in time and space. He experiences himself, his thoughts and feelings as something separated from the rest—a kind of optical delusion of his consciousness. This delusion is a kind of prison, restricting us to our personal desires and to affection for a few persons nearest to us. Our task must be to free ourselves from this prison by widening our circle of compassion to embrace all living creatures and the whole nature in its beauty.”

Albert Einstein



## A History of Student Activism at UBC



UBC Students protest increasing fees outside Faculty Club Jan., 1989



Student tent city built on Main Mall to protest lack of housing Oct. 3, 1966