

The Social Contract

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Preface

On behalf of the Department of Political Science, I am both happy and proud to congratulate you on publishing this year's issue of *The Social Contract*. The editorial staff invested significant time and effort to produce a fine volume that includes some of the best essays submitted by undergraduate students over the past year.

In this issue of *The Social Contract*, some of our best students address wide-ranging questions with insight and logical rigour. Politics is all around us, and the essays that follow exemplify the claim that it can be studied systematically in a way that deepens our understanding. In this journal, readers will discover the value of reflecting on political issues, institutions, and phenomena that affect us all.

This issue includes essays on a range of topics covering the main subfields of political science, but the questions they raise are relevant to the wider public as well. Consider the array of topics discussed: the relation between American constitutionalism and human rights; the relevance of so-called 'right to work' legislation; the ethical implications of New Public Management; the case for aboriginal self-determination; the problems with mandatory minimum drug sentences with specific reference to the United States and Canada; the complex issues raised by interracial marriage in the United States; a proposal for achieving peace and security in Darfur; the implications of the European Union's arms embargo against China; the role of the Internet in political campaigns; the issues raised by the discourse surrounding the so-called War on Terror; and the link between historical injustices and current struggles for social equality. This list shows the breadth of concerns addressed by our students, from specific policy issues to some of the major national and international dilemmas of our time.

The Department of Political Science at Western is proud of the excellent students who worked hard to produce this issue of the journal. As Professors, we spend our working lives producing our own research, so we know that it takes dedication and perseverance to produce work of such high quality.

Please accept our thanks, our congratulations, and our best wishes.

Charles Jones
Chair
Department of Political Science
University of Western Ontario

Letter from the Editor

I am proud and honoured to present *The Social Contract* in its eighth year of publication. As an academic journal, *The Social Contract* has grown enormously in my time at the University of Western Ontario, becoming an important fixture in the Department of Political Science. This publication not only allows us to recognize the achievements of our published authors but also serves as a valuable tool for all Political Science students by providing examples of outstanding essays written by fellow undergraduates.

The publication of *The Social Contract* this year would not have been possible without the hard work and input of countless students. I would like to thank each of the section editors for dedicating their time and effort to reading the submissions and for lending their invaluable insights to the published essays. To the Editorial Board—Amir Eftekharpour, Jennifer Humphrey, and Connor Lyons—I cannot thank you enough for your commitment and enthusiasm throughout this entire process, which began at the beginning of the school year in September. I look forward to seeing *The Social Contract* grow in its ninth year under the exceptional leadership of Connor Lyons, who will assume the role of Editor-in-Chief next year. I would also like to thank Professor Nigmendra Narain, without whose support and guidance the journal could never have made it this far. Finally, thank you to all those who submitted your essays. The quality of papers we received was outstanding, and I could not be more proud to call myself a Political Science student this year.

The diversity of topics and perspectives represented in this volume of *The Social Contract* will no doubt engage, stimulate, and trouble readers. My hope is that the discussions sparked by these essays will help foster a vibrant public sphere in which old ideas are challenged and new ideas are born. To any first year student who has picked up this journal, I encourage you to read these essays, learn from them, and question them. Perhaps the most exciting part of being a member of this Department is grappling with the complex issues of the day, and I hope *The Social Contract* serves as an example of the kind of relevant and fascinating work you can accomplish as a student of politics.

Regards,

Cindy Ma
Editor-in-Chief

Editorial Board and Staff

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THE SOCIAL CONTRACT

POLITICAL THEORY

War in the Name of Humanity: Liberal Cosmopolitanism and the Depoliticization of the War on Terror

By Monica Kozycz

The War on Terror has become symbolic of warfare in the twenty-first century. The War itself is not simply a military engagement between states but has expanded into domestic policies involving American citizens, military efforts to infiltrate non-state terrorist networks and a shift in discourse from state interests to humanitarianism and the protection of global freedom in the face of evil. This essay argues that the discourse of humanitarianism that has been used to frame the War on Terror has caused the war itself to become depoliticized, substituting traditional political tensions with moral ones. The greater distinction between Self and Other and the reliance on ‘universal norms’ that has emerged from this discourse have led to a dangerous escalation in what is seen as legitimate action in the war. Furthermore, this depoliticization of war is accompanied by a growing militarization of peace, wherein peace becomes an unlikely or impossible entity and the very existence of a true ‘civilian’ population is called into question. This essay analyzes the dynamics of modern humanitarian interventions and Just War theory in relation to Carl Schmitt’s criticism of the liberal cosmopolitan order. The War on Terror is then examined as a case study of the new liberal cosmopolitan form of war and the dangers that can be associated with it, such as the recognition of an evil Other, the emergence of moral hegemony, increasing legitimacy in the escalation of military engagements and war measures, and the militarization of peace through total war.

The idea of military action rooted in humanitarian discourse and associated with morality is not a new development of the twenty-first century. The War on Terror is part of a wider trend towards Just War thinking, which originated in the Middle Ages with regards to religious crusades and was resurrected as part of the new liberal cosmopolitan order that was established following the First World War. Just War theory originated with the writings of St. Thomas

Aquinas and focused on the notion that “peace was the norm, but in certain circumstances, when peace was violated, violence might be required to rectify this injustice” (Brown 2007, 57). Thus, Just War theory was fundamentally connected to the identification of a just cause. At the time of its origin, the just cause was the propagation and protection of the Christian religion against all those who threatened it (64). In more modern times, Just War has been associated with a set list of criteria. As Chris Brown notes:

we ask of any particular actions whether the force employed is intended to right a wrong, is the last resort, is proportional to the offence, has reasonable prospects of success, is undertaken with proper authority and with care being taken, as far as possible, to protect the innocent (64).

Thus, any act of war adhering to this description can be deemed just. While questions regarding the true legality of such a measure might remain, as it may still violate international law and the decisions of the United Nations Security Council, acts of war that are viewed as “just” are deemed more legitimate by the Western international community.

In recent history, Just War has become strongly associated with instances of “humanitarian intervention,” where coalitions of states, typically from the West, have engaged in military action against sovereign states in order to protect citizens from mass atrocities and human rights infringements. This form of intervention has been entrenched in the United Nations’ Responsibility to Protect Doctrine, introduced in 2001, which allows for countries to violate the sovereignty of other states if the state in question fails to protect the rights of its own citizens (Dexter 2008, 74). This was the case in the 1999 NATO invasion of Kosovo, 1992 intervention in Somalia and the recent military campaign in Libya conducted by a coalition of forces aimed at bringing down the oppressive Gaddafi regime. Furthermore, it has been argued that the wars in Afghanistan and Iraq, fundamental extensions of the overarching War on Terror, also exhibit certain characteristics of humanitarian interventions since the liberation of oppressed populations from authoritarian, often despotic regimes that ignored traditional notions of human

rights arose as a central theme in the discourse surrounding both wars. Thus, while the previous cases of intervention in the name of human security have been deemed as legitimate, it can be argued that humanitarian intervention is not only a distinct form of military intervention, but also an emerging form of discourse that is used to characterize war itself in the twenty-first century. Moreover, the central focus of humanitarian intervention discourse surrounds the idea of human rights and the duty of sovereign states to uphold the rights of individuals outside of their own borders when they are being violated. Subsequently, by framing conflicts and military actions as a form of humanitarian intervention, issues of humanity and morality are placed above the traditional political causes of war, such as conflict over territory, economic interests or ideology.

Even before these instances of formal humanitarian intervention had occurred, Carl Schmitt, a German realist scholar writing in the mid-twentieth century, was critical of the new forms of military conflict based in a “discourse of humanity” (Odysseos 2007, 126) associated with the emerging liberal cosmopolitan order. In *Der Nomos der Erde*, Schmitt argued that wars that occurred between the establishment of the Peace of Westphalia in 1648 and the end of the First World War were unique in that there existed a mutual recognition between parties of their opponent as an “equal and just enemy” (126) and that, because of this recognition, peace could be achieved when one party surrendered. This type of warfare was central to Schmitt’s concept of the political as he argued that politics itself is rooted in the distinction between ‘friend’ and ‘enemy’, making conflict an inevitable part of politics (127). However, the First World War triggered the fall of the Westphalian system, which emphasized states as sovereign bodies, and led to the emergence of liberal cosmopolitanism. Under this new liberal order, the individual was seen as superior to the state and, consequently, a greater level of importance was placed on human rights and security rather than sovereignty. In response to this shift, Louiza Odysseos argues that “for Schmitt, the focus of liberal modernity on moral questions aims to ignore or surpass questions of conflict altogether...and is therefore the battle against the political—as

Schmitt defines political” (132). Furthermore, this discourse of humanity rather than sovereignty “excludes the concept of enemy because the enemy does not cease to be a human being” (133). Returning to the notion of humanitarian intervention and Just War, it can be suggested that these interventions do not necessarily represent true conflicts between sovereign states, but instead follow a liberal tradition of fighting for the rights of individuals. Therefore, based on Schmitt’s observations, humanitarian interventions, which associate military actions with humanitarianism, leads to the depoliticization of war because these ‘conflicts’ do not occur between two sovereign enemy states, but are instead seen as crusades in the name of humanity.

A central aspect related to this humanitarian crusade is upholding the notion of human rights. However, as Schmitt implies, characterizing conflict in this way and replacing the interests of states with the well-being of individuals is dangerous and, instead of leading to a sense of common humanity that promotes peaceful coexistence, actually promotes a greater degree of Othering. Odysseos argues that “the liberal and humanitarian attempt to construct a world of universal friendship produces, as if by internal necessity, ever new enemies” (137) and this new form of enemy is the inhuman. However, as numerous critics of liberal humanitarian theory suggest, defining conflict based on the notion of humanness, a characteristic that one would assume all people possess, is dangerous. William Rasch notes that human rights have been used as the basis for geopolitical pursuits and the very notion of humanitarianism is flexible so that the term can be applied to any intervention in order to legitimize military engagement (Rasch 2003, 138). Rasch argues that in modern political discourse, “the term ‘human’ is not descriptive, but evaluative,” and subsequently, while there may be recognition that all individuals belong to humanity, if only biologically, “certain peoples...are lesser members than others, possessing fewer rights” (139). This subjective nature of human rights is evident in the War on Terror, as will be discussed later in this paper, and suggests that the entire concept of human rights as a universal norm is flawed. Indeed, Schmitt would agree with Rasch on this

statement, as he too argued that the notion of universal humanity cannot truly exist and subsequently the ‘discourse of humanity’ holds an instrumental function. Specifically, “when a state fights its political enemy in the name of humanity...it tries to identify itself with humanity in the same way as one can misuse peace, justice, progress and civilization in order to claim these as one’s own and to deny the same to the enemy” (Bishai and Behnke 2007, 110). Therefore, the notion of human rights is a paradox in itself because in order to promote these rights, one must also acknowledge the ‘inhuman’ forces that threaten them, further weakening the sense of commonality between individuals.

This essay will now examine how the War on Terror embodies Schmitt’s arguments regarding modern liberal cosmopolitanism, the discourse of humanity and the depoliticization of war. As Dexter observes, “right from the start, the War on Terror was presented by the White House as a classic ‘good war’ that adhered to ‘just war’ principles” (Dexter 2008, 65). This characterization occurred mainly through the public rhetoric of President Bush and other officials following the September 11, 2001, terrorist attacks and was perpetuated by the media and various other popular culture outlets. This rhetoric framed the terrorist attacks in a way that legitimated military action, identified the enemy as an evil threat to common humanity and emphasized the American tradition of protecting liberty and ‘goodness’.

Stuart Croft argues that the military response to the 9/11 attacks was not inevitable but the result of specific events that shaped the narrative surrounding the attack. On a similar note, Dexter argues that the immediate labeling of the terrorist attacks as an act of war would subsequently allow any military retaliation to be deemed a legitimate form of self-defense (66). This framing was evident when, in President Bush’s first address following the attacks, he referred to them specifically as an “act of war” as opposed to a criminal act by a group of rogue terrorists. Not only did this labeling legitimize a military response, but it also brought Al Qaeda into the war discourse, suggesting that even though it represented a unique enemy distinct from

traditional state actors, the Al Qaeda network was still worthy of official military engagement (68). Dexter argues that, had Al Qaeda's actions not been associated with traditional warfare by Bush, retaliation would not have followed a Just War route so easily.

In addition to immediately connecting terrorism to acts of war, Bush's rhetoric also reinforced the Just War narrative surrounding the War on Terror by emphasizing the campaign as a struggle between good and evil, focusing on a moral crusade over traditional political interests. Moreover, the use of a binary, Manichean discourse, which highlighted the opposing forces of good and evil was also instrumental in leading to the depoliticization of the war and reinforced a struggle between Self and Other. This binary, moral discourse was evident immediately following 9/11, when in his first brief public address to the country, Bush used the terms 'evil' and 'freedom', which in this case represented the antithesis of the former, each four times (Bush 2001). He emphasized that the country's "freedom came under attack" and "thousands of lives were suddenly ended by evil" (Bush 2001). This sentiment was echoed in his joint address before Congress on September 20, 2001, where he promised to engage in action that would rid the world of "evil doers" and protect American freedoms and values (Bush 2001). This type of rhetoric surrounding the War on Terror continued long after September 11, and Bush continued to speak of the "axis of evil," consisting of Iraq, Iran and North Korea, and consistently framed the Iraq War as a crusade to rid the world of the evil doers associated with Saddam Hussein's regime (Bush 2002). Therefore, from its inception, the War on Terror has been characterized as a moral conflict between the forces of good and evil. Not only has this form of rhetoric been instrumental in framing the War on Terror as a Just War, following in the traditions of humanitarian intervention, but it also follows Schmitt's prediction that the traditional friend-enemy distinction used to frame traditional conflicts has shifted towards a fundamental clash of morality and a subsequent good-evil distinction.

It is important to note that this type of rhetoric regarding a military conflict is symbolic of a greater trend that has persisted throughout American history and is a fundamental aspect of American exceptionalism. As Goodhart notes, right from its colonial Puritan origins, America was seen to embody a “city upon a hill,” which would act as a moral beacon for the rest of the world (Goodhart 2011, 70). Goodhart observes that American culture and pedigree regards “the United States as a chosen nation, one upon which Providence has bestowed the unique blessing of liberty and which therefore has a historical mission to defend and disseminate liberty throughout the world” (70). In reading this, it can be interpreted that any enemy to liberty would therefore be deemed the epitome of evil by America. Instances that have seen this exceptionalism in practice include the numerous attempts by American settlers to ‘civilize’ the Native American population through military and religious means; the American Revolution itself, which emphasized liberation from British oppression; the Second World War, described as the “ultimate good war” (Dexter 2008, 66), where America was seen as the heroic state that would bring down Hitler’s forces and end the brutal atrocities practiced by his regime throughout Europe; and finally during the Cold War, which saw the characterization of America as the guardian of individual liberty and democracy in the face of the Soviet threat (Goodhart 2011, 75). Goodhart also notes that these military campaigns can be seen as examples of “messianic engagements” that “aim to refashion the world in America’s image, implementing the model of democratic liberty” (75). Similarly, “the War on Terror is not just a sound security policy, nor merely a just, or justifiable war, it is a divine calling, a ‘good war’ comparable to the Second World War” (Dexter 2008, 66). Thus, for America to be associated with the guardian of humanity or champion of the good, as the moral discourse surrounding the War on Terror demonstrates, is not a new phenomenon. By extension, the acknowledgement of the enemy as subordinate, evil and a threat to goodness and humanity is also not new. In fact, this characterization has been reinforced by the establishment of American hegemony following the

Second World War, for not only has America become an economic and military superpower, but it has also transformed into a moral superpower whereby, “to oppose American global hegemony is to oppose the universally good and common interests of all humanity” (Rasch 2003, 123). Indeed, the very existence of a hegemonic moral authority runs in opposition to Schmitt’s notion of the political by eliminating the room for true conflict and combative discourse and implying that the ‘right answers’ are always found in the policies and positions of the United States.

Proponents of Schmitt and other modern critical theorists argue that this form of moral hegemony, which is manifested in the War on Terror, is dangerous and leads to the greater escalation of conflict. As previously discussed, moral conflicts that frame war as a clash between good and evil and focus on the discourse of humanity and human rights, create a greater distinction between Self and Other and as a result, the enemy is dehumanized and must be eradicated completely. This dehumanization has been reinforced by Bush, who argued that “the great divide of our time is not between religions and cultures, but between civilizations and barbarism” (Bishai and Behnke 2007, 107). Barbarism has thus become synonymous with the Islamic terrorist enemy who is associated in popular rhetoric with images of the cave, a symbol of the “primitive, undeveloped, uncivilized and anti-progressive” (Croft 2006, 150). Furthermore, the Manichean distinction between the Self and Other in the War on Terror was reinforced when Bush acknowledged that in the ‘war’, “you are either with us, or you are with the terrorists”. The absence of a gray area between the so-called civilized, freedom-loving world and that of the evil terrorists forces the classification of individuals into distinct categories, with one being subordinate to the other. Even while being framed as a conflict aimed at promoting human rights and freedom, the War on Terror only focuses on ensuring the rights of specific ‘humans’, who are identified as worthy of protection. Those who do not fall into this category are dehumanized and, as a result, any rights that they possess are overlooked, as they are identified as being an enemy before a true human. Moreover, this demonization “permits not

simply their defeat, but their elimination” (Odysseos 2007, 137). In pursuing elimination rather than regulation, more heinous and radical treatment of these inhuman enemies are deemed acceptable.

This distinction between the good human and evil inhuman enemy that exists in the modern Just War discourse is dangerous because it further legitimizes actions taken by the West that would otherwise be deemed questionable or unacceptable. As Kenneth Booth noted when critiquing the use of Just War narratives in the NATO invasion of Kosovo in 1999, “if one’s cause is ‘just’, it seems any level of escalation can be justified, even nuclear Armageddon [as was the case during World War Two]” (Booth 2000, 315). In this sense, perhaps the most paradoxical aspect of the War on Terror is that, while it is framed as a humanitarian conflict that seeks to promote individual rights and freedoms, many methods used to carry out the War neglect the idea of human rights and freedom altogether. Dexter acknowledges this inconsistency by raising the question: “how can one talk of a return of the ‘good war’ when faced with Abu Ghraib, with Haditha, with rendition flights, with the detention of suspects without trial and with a war which has prompted torture to enter official political discourse?” (Dexter 2008, 75). In such instances, it is clear that the rights of the accused terrorists to life, liberty and due process—rights described by the United Nations as universal—are neglected by the Western powers that espouse them. Here, the killing of civilians, torture of prisoners, and general suspension of international law and the Geneva Convention are justified by the perpetrators as being essential to the fight against evil, which threatens greater humanity (75). In these cases, it becomes apparent that while war may be justified in its cause, the means by which this cause is pursued are not necessarily just and can be radically inconsistent with the discourse of human rights employed to legitimize it; this inconsistency reveals a “selective morality,” which regards some individuals as subordinate to others.

Additionally, the very notion of pre-emptive war, which is strongly connected to the War on Terror and specifically the War in Iraq, has become acceptable only because of the depoliticized nature of the War on Terror. As Kellner observes, the recognition of an “amorphous terrorist enemy allows the crusader for good to attack any country or group that is supporting terrorism, thus prompting a foundation for the Bush Doctrine of preemptive and perennial war” (Kellner 2007, 628). Specifically, the Bush administration has framed the War on Terror in such a way that even preemptive military engagements, which are normally regarded as both illegal and illegitimate and run in sharp contrast to the traditional definition of Just War, are effectively justified as being essential to the crusade against evil. As Kellner argues, by framing the Iraqi threat as an extension of the evil demonstrated on September 11, 2001, even though little evidence existed to connect the two, the United States was able to engage in a war against the Hussein government without suffering from international sanctions or criminal charges that normally would have followed similar preemptive military actions (630). Nevertheless, numerous critics of the Iraq War argue that moral, humanitarian narratives were in fact used to mask the underlying economic and political motivations of the Bush administration in regards to Iraq, namely oil interests.

This example suggests that the nature of politics, as described by Schmitt, is not lost completely, but is simply masked by the discourse of human rights and morals. In essence, the depoliticization of warfare and shift to moral crusades aimed at eradicating evil obscure the fact that wars are still based in self-interest, often with strong economic, ideological or political goals. However, to the general public, these goals become secondary to the larger overarching mission of securing freedom, and thus the conflict itself is seen as being grander in scale than traditional ‘political’ wars. Moreover, the public is generally more receptive to humanitarian wars or interventions, and thus governments gain more support for this type of action than they would for military campaigns aimed at securing economic interests. As Odysseos notes, “in the

age of War on Terror, wars that make the world better...need no further justification” (Odysseos 2007, 139). Consequently, almost any actions, including those that would normally be condemned, are justified during the War on Terror as a means of carrying out a larger moral goal.

It has been demonstrated that the rhetorical depoliticization of war blurs the line between traditional notions of friend and enemy and leads to the distinction of human and inhuman and good versus evil. This shift in discourse during the War on Terror has also led to a growing militarization of peace wherein the discourse traditionally used to describe peacetime has absorbed elements of military discourse and peace becomes impossible because of the very nature of the new enemy. Bishai and Behnke elaborate on this point by arguing that because the enemy is regarded as an evil, inhuman Other, which must be completely eradicated to restore peace and protect the good, “peace and peaceful means of diplomacy and statecraft become the extension of war, as the imminent end of history and the coming of a world of liberal states can afford no lasting peace and recognition of the Other” (Bishai and Behnke 2007, 121). Therefore, as long as the category of the Other exists and as long as the enemy is seen as the Other, the antithesis of the moral human, peace cannot be sustained. Since the actual prospect of eliminating all global terrorists and officially ridding the world of ‘evil’ is a gargantuan task, if even possible, it is unlikely that the goal of peace without the threat of evil can ever be achieved.

Moreover, because today’s enemy is an individual as opposed to a state, individuals have become the targets of warfare, replacing armies and other traditional military actors. This trend is evident in the use of Taqiyya warfare, a tactic employed by subscribers to radical Islam, in which individuals hypercamouflage into host societies that they attack or cause to self-destruct (Negarestani 2006, 54). Reza Negarestani argues that with the use of Taqiyya tactics, “peace is directly used as a weapon, exploited as a new place for invasion, insurgency and for offensive strikes against enemy bases” and terror itself “threatens the basic notions of survival...death

hangs over and regulates every moment that is lived” (54). Thus, terrorism, especially the type associated with the War on Terror, is fundamentally tied to the notion of peace since the success and awe factor of terrorist attacks stem from the fact that they usually take place during periods of relative peace. Moreover, Negarestani argues that the spread of Taqiyya has caused Western countries threatened by Islamic terrorism to impose a greater level of surveillance on ‘civilian’, non-military populations since it is these populations that Taqiyya warriors seek to infiltrate. The result is that the discourse of military combat, which is characterized by talk of insurgency, discipline, and intelligent surveillance mechanisms, is absorbed by discourses normally associated with peace. Through the introduction of domestic provisions such as the PATRIOT Act, security initiatives at border points and the increased power given to the government to interrogate and survey American citizens, the War on Terror has effectively led to the “eradication in principle of all civilian populations” (90). Civilians are now the targets of both the terrorist enemy as well as the actors used by the government to wage war on terror domestically. Indeed, in this case, the argument can be made that the War on Terror is a total war and every individual is a direct player, as they are seen as both a potential victim and a perpetrator of terror.

Based on the evidence provided, it can be seen that the War on Terror has been framed as a form of humanitarian, moral conflict that embodies a struggle between good and evil. However, based on the observations of Carl Schmitt and critiques of the War thus far, it can be concluded that this form of liberal cosmopolitan warfare centered on the promotion of individual human rights and freedom can lead to a dangerous classification of individuals as either human or inhuman, mask states’ political interests with idealistic notions of morality, justify military actions that may otherwise be seen as unacceptable and lead to the dissolution of true peace by militarizing civilian populations. Therefore, as Schmitt predicted, liberal cosmopolitanism does not eliminate the notion of war but instead depoliticizes it and moves it from a political conflict

between friend and enemy to a moral dispute between the forces of good and evil, which is no less detrimental to society than the traditional realist form of war.

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Restitutive Justice: The Key to Social Equality

By Philip Henderson

In a culture characterized by deep concern for private property and personal prosperity, it is often easy to allow the basis of one's social status to go unquestioned. Most people are happy to assume that what they have achieved is justly theirs and to believe that their personal adherence to laws and moral codes will secure them in this claim. These tendencies decouple the present reality from the historical situations upon which it is built. Such disconnect often obscures major injustices of the past, which are largely responsible for creating the current state of affairs. To this argument, the popular retort is that these injustices occurred 'a long time ago,' and are therefore of little relevance today. A trend amongst political thinkers is to address restitutive justice in terms of forward-looking justice, or merely as an expression of distributive justice. Neither of these approaches addresses the injustice itself because they treat historical atrocities only in terms of their persistent effects. This attempt to "close the gap between past and future" is exactly the wrong approach.¹ This paper will assert that 'it was a long time ago' is an entirely inappropriate response, as it ignores the moral repugnancy of past injustices. Gross injustices must be denounced as ontological evils; failure to do so belittles and cheapens the suffering of those who have been victimized. Using Janna Thompson's "Historical Obligations," and "On Special Ties (2): What Do We Owe?" from Richard Vernon's *Friends, Citizens, Strangers*, this paper will highlight that in the contemporary debate little attention is paid to the original injustice itself.

It is important to ensure clarity regarding the idea of 'past injustices.' While certain examples spring to mind, such as the genocide in Rwanda, injustices may also take many other forms. Vernon provides an extensive list of what is meant by the phrase 'past injustice':

¹ Richard Vernon, *Friends, Citizens, Strangers*, (Toronto: University of Toronto Press, 2005), 233.

[G]enocide, slavery, and the dispossession of territory; enforced prostitution; sexual assault; forced conversions; deportations; the enforced and deliberate deprivation of culture; theft of money or of valuable objects such as works of art; the appropriation of human remains or of cultural objects for scientific purposes; persecution for religious or other reasons; acts of war; the internment of ‘enemy’ aliens; unjust taxation or immigration policies; or the failure to help vulnerable groups in times of great need.²

Each of these injustices represents different acts that demand restitution at both micro and macro levels. Moreover, each of these acts must be recognized as a morally inexcusable expression of human cruelty. Any complete theory of social justice must seek to address the abhorrence of this cruelty directly, without ulterior motives.

This discussion will begin by examining Thompson’s article. To begin, Thompson must be recognized for several astute observations. She explains that historical context is vitally important for understanding the proper administration of justice. However, Thompson’s work falls short of morally rebuking past injustices. This failure is reinforced by her tendency to focus on benefits for the present generation, at a possible detriment to successive generations. Thompson’s work will prove to be cognizant of historical dimensions only for the justification of current actions, rather than for addressing the moral dimensions of previous injustices.

Thompson’s article must be commended for raising a key point in discussions of historical injustices; it begins by asserting that historical events are “often causally responsible for present inequalities.”³ Thompson argues that present injustices are the result of decisions and actions which often predate the actors immediately concerned. In this way, the injustices of the past will persist over time if they are left unaddressed. A poignant example is the economic dependency currently experienced by indigenous nations in Canada, following the “naked theft” of their ancestral territory by the state.⁴ Thus, a group that has been systemically disadvantaged by an injustice that occurred long ago continues to suffer the ramifications today. Moreover,

² Ibid., 226.

³ Janna Thompson, “Historical Obligations,” *Australian Journal of Philosophy* 78, no. 3 (September 2000): 334, <http://www.tandfonline.com.proxy1.lib.uwo.ca/doi/abs/10.1080/00048400012349631> (accessed November 10, 2012).

⁴ Todd Gordon, *Imperialist Canada* (Winnipeg: Arbeiter Ring Publishing, 2012), 69.

these current injustices cannot be resolved simply by attempting to raise indigenous people to a level that is roughly equal to an average Canadian. Such attempts at distributive justice would imply that the historical claims of indigenous nations are “irrelevant or unjust.”⁵ By redressing claims of disadvantage on an individual basis, the collective historical suffering of indigenous people is undermined and deemed irrelevant. Furthermore, this approach reveals a conceit, on the part of officials, that indigenous national identities mean next to nothing to the Canadian state. So while distributive justice could alleviate suffering, it serves to compound the degraded status of once autonomous nations by officially rupturing their character as a distinct people. Thompson also points out that historical context is an appropriate gauge of responsibility because it assumes that no other wrong would have been suffered by the victim group and they would otherwise have prospered.⁶

Here, Thompson is closest to addressing the problem itself. Yet rather than denouncing these injustices as morally repugnant, she undermines their severity with restrained language. Calling theft of land, forcible confinement, indoctrinating education, destruction of families and culture and other systematic injustices visited upon indigenous people “gross acts of disrespect” is more than an understatement.⁷ This weak language enables Thompson to treat the subject of historical crimes with detachment, rather than the necessary moral revulsion. Thompson’s misrepresentation of a crime against humanity, and morality, as ‘disrespect,’ informs her larger frame of thinking on the subject. She employs a protective veneer, rather than address the full extent of the historical injustices.

After sterilizing the injustices of the past, Thompson suggests a reason for redressing these wrongs that is fundamentally self-serving. For her, all present obligations to the past must be seen through forward-looking lenses: when one considers their obligations as they regard previous injustices, it must be from the “perspective of those who want to maintain or establish

⁵ Thompson, 344.

⁶ Ibid., 342.

⁷ Ibid., 340.

posterity-binding commitments.”⁸ By “posterity-binding,” Thompson means that the commitments made are deemed to “impose moral obligations on future members” of the group, institution or society.⁹ It is apparent that Thompson does not mean to address past wrongs because there is something inherently objectionable in their character. Instead, she is motivated to restore justice primarily because she seeks the moral authority to act freely in formulating current policies. Thompson’s approach is morally suspect. Imagine that post-war Germany had given money to the newly formed Israeli state; yet, rather than intending to show sincere humility for the *Shoah*, Konrad Adenauer’s intention was to establish the moral authority necessary for Germany to later enact trade treaties with Israelis. Revelations of such intentions would incite mass rebuke of the German Chancellor. Attempts to redress historic injustices must come as a true expression of regret and remorse for the atrocity. This can only occur by recognizing and recompensing past injustices for their own sake. Anything less than that or any ulterior motives would only serve to undermine the sincerity of the victimizer, and to cheapen the suffering of the victim.

In contrast to Thompson’s work, the assertions of Richard Vernon give more fodder for analysis. Much like Thompson, Vernon’s arguments carry several important insights for redressing historical injustices. His main contribution to the debate regards how the victim ought to be approached. However, Vernon’s paper asserts that past wrongs can be corrected through a universalist moral framework. This stance, however, undermines the importance that a historical relationship holds in determining obligations of justice. In order to correct this, an extended critique of Vernon’s ‘pool yard’ thought experiment will be provided. Vernon’s work will be proven to be properly concerned with the welfare of the victim, but ultimately inattentive to the basic nature of the obligations that the offense confers.

⁸ Ibid., 338.

⁹ Ibid., 336.

In many ways, Vernon's "What Do We Owe" is focused on the nature of damage done to the victim and the obligations that this imposes on the perpetrator. Vernon asserts that being separated over a period of time from the injustice is not enough to absolve the "transmission of responsibility."¹⁰ Responsibility can be transmitted most easily when the actors remain constant. Put differently, if the victimized and victimizer groups persist through time then the transmission of responsibility is easily determined. In the case of states, who base their legitimacy on "continuity through time," and of cultural groups, which can be seen as "continuous collective entit[ies]," responsibility is easily proven.^{11 12} Thus, it is possible to conceive of both the victimized and the victimizer persisting through time, despite the fact that the original individuals who comprised these groups are likely deceased. Furthermore, unlike Thompson, Vernon explicitly expresses the need for the recompensing party to empathize with their victim. He asserts that seeking to correct a wrong without attempting to understand "the point of view of those who suffered [the wrong]" is "absurd."¹³ It is exactly this type of concern that Thompson lacks. By seeking to understand the victims' perspective, Vernon has added much greater significance to the wrong. For if one were to view past injustices from only their own perspective—in many cases the perspective of the wronging party—it becomes impossible to understand the full extent of the suffering that has been caused. Only by internalizing the injustice and attempting to empathize with the victim is there even a possibility of understanding how redress can be accomplished. Vernon's victim-centered approach proves to be far more attentive to the suffering of the wronged party than Thompson's forward-looking model.

Despite this strength, Vernon's methodology takes a decidedly ahistorical approach to obligatory relationships, which ultimately ignores the nature of the suffering in question. He

¹⁰ Vernon, 228.

¹¹ Ibid.

¹² Ibid., 240.

¹³ Ibid., 235.

argues for a “version of the universalist position” of establishing justice.¹⁴ In essence, this position treats roughly similar cases of suffering as morally equal. It follows that if Group A and Group Ω were to suffer from nearly the same level of poverty or deprivation, their cases should be handled with the same urgency. This approach has wide-ranging appeal because it demands equal treatment, and there is no need to make special arrangements. Priority is given to those whose need is greatest. However, for this universalist position to be deemed moral, it necessitates that special historical relationships and obligations be discounted. Indeed, Vernon establishes this position through a protracted thought experiment, which will be called the ‘pool yard’ experiment. In this scenario, there are several individuals around a pool. For whatever reason, A_1 and A_2 decide to push V_1 and V_2 (respectively) into the pool. At this precise moment R_1 and R_2 fall into the pool of their own accord. All this occurs as B_1 and B_2 watch on, having played no part up to this point. Vernon then poses the obvious question: “[w]ho has a right to be rescued, and who has a duty to rescue?”¹⁵ Having asserted that all have a “right to [be] rescue[d]” and all have a “duty to rescue,” Vernon concludes that, provided all in danger are rescued, the result would not be “any worse... than an outcome in which each pusher had rescued... [their] respective pushee.”¹⁶ Vernon’s universalist position asserts that justice is restored so long as the worst possible outcome is averted. As such, A_1 and A_2 have no greater duty to restore a state of well being to V_1 and V_2 than they do to R_1 and R_2 . Historical relationships do not factor in their administration of aid.

This does not, however, address the core nature of the negative utility, or disutility, involved in the thought experiment. Vernon’s model assumes that V_1 , V_2 , R_1 and R_2 all suffer equal disutility, by virtue of their being endangered. Furthermore, it assumes that this disutility can be undone by anyone of A_1 , A_2 , B_1 or B_2 intervening to save them from further harm. Represented as an equation, Vernon’s rescue model would look something like this:

¹⁴ Ibid., 227.

¹⁵ Ibid., 230.

¹⁶ Ibid., 230-231.

$$(A_1^+ \cdot A_2^+ \cdot B_1^+ \cdot B_2^+) \mapsto (V_1^- \cdot V_2^- \cdot R_1^- \cdot R_2^-) = V_1 \cdot V_2 \cdot R_1 \cdot R_2$$

This equation illustrates that, through the actions of any individual in the first set of brackets, the disutility of any individual in the second set can be completely erased. Vernon's model assumes that disutility is derived only from the imminent danger of drowning; it discounts the disutility caused by the originator of the danger. In this case, asserting that all the drowners have equal disutility ($V_x^- = R_x^-$) is logical. While this example reinforces Vernon's assertion that a universalist position of rights and duties is sufficient, it does not accurately represent the distribution of disutility.

The fundamental problem here is that the disutility experienced by V_1 and V_2 is not the same as that suffered by R_1 and R_2 . All four actors do experience the disutility of nearly drowning, so they could certainly be characterized as V_x^- and R_x^- . However, this model discounts the special harm done to V_x over that experienced by R_x . This special harm is the injustice of being pushed into the pool, which is a disutility additional to the harm of nearly drowning. Rather than being represented as V_x^- , a more accurate depiction of this specific suffering might be V_x^{-} . Having no instance of similar injustice in their past R_x could still be represented simply as suffering only the disutility of potentially drowning (R_x^-). However, in the foreseeable circumstance where R_x 's disutility is more immediately pressing than that of V_x (for example R_x is unconscious in the water), R_x would also have to be represented as R_x^{-} . A problem in the representation of double disutility emerges, because even represented as doubly negative R_x could still be fully restored by any of A_x or B_x rescuing them. Furthermore, this situation would seemingly disprove the notion of a special obligation being exerted on A_x to help V_x if even double disutility can be corrected by any actor.

This outcome is the result of insufficient specificity in regards to the double disutility experienced by V_x . The double negative symbol is more effective in the case of R_x , because it serves better to represent a raised level of suffering. In the case of V_x the issue is not the level of

suffering, rather it is the origins of that suffering. The primary disutility of V_x was specifically created through the actions of A_x , the absence of which would have left V_x at perfect utility. It is because of this factor that the intervention of B_x is insufficient to restore full utility to V_x . A precise representation of the total disutility would be: $(V_1^{-A2} \cdot V_2^{-A2} \cdot R_1^{-} \cdot R_2^{-})$, where $^{-Ax}$ is representative of the disutility directly traceable to the act of pushing V_x into the pool. In this arrangement, only A_1 and A_2 can (respectively) resolve the disutility labeled $^{-A1}$ and $^{-A2}$, because of their singular role in creating this disutility. This new notation creates a special relationship between A_x and V_x , which is the cause of specific disutility. Acknowledgement of the immorality of subjecting someone to a situation of disutility requires recognition of this special historical relationship. This model undermines Vernon's assertion that if B_x saved V_x and A_x saved R_x , then total utility would be restored. In reality, Vernon's model would look much more like this:

$$[A_1^+ \cdot A_2^+] \mapsto [R_1^{-} \cdot R_2^{-}] / [B_1^+ \cdot B_2^+] \mapsto [V_1^{-A1} \cdot V_2^{-A2}] = (V_1^{-A1} \cdot V_2^{-A2} \cdot R_1 \cdot R_2)$$

In this model, although none drown, only R_1 and R_2 have been fully restored, $V_1 \cdot V_2$ continue to suffer from the injustice of being pushed into the pool. Yet, if A_x resolved to aid their victim V_x , while B_x was responsible for rescuing the hapless R_x , then the results would look something like this:

$$[A_1^+] \mapsto [V_1^{-A1}] / [A_2^+] \mapsto [V_2^{-A2}] / [B_1^+ \cdot B_2^+] \mapsto [R_1^{-} \cdot R_2^{-}] = (V_1 \cdot V_2 \cdot R_1 \cdot R_2)$$

Significantly, only in the second equation is perfect utility truly restored. Vernon's assertion that the outcome would be morally no worse were B_x to aid V_x , rather than requiring A_x to make amends, proves to be incorrect. When his suggestion is followed, the final total of disutility is $(^{-A1} \cdot ^{-A2})$, the morally repugnant acts of A_x persists as this disutility. However, if it is required that A_x recompense their victims, all disutility is absolved. This morally preferable situation can be established only by adding what Vernon had neglected: an ontologically negative value for the act of bringing another into harm. If double disutility can occur in the mundane pool yard, it

certainly exists following an atrocity. This lengthy formula is easily extrapolated to explain why restitutive justice is an essential part of morally sound public policy. The universalist position is wholly inadequate for such a task, precisely because it does not account for the special disutility that victims of injustice experience.

The existence of historical injustices is undeniable, as is the persistence of their effects. Such injustices are expressed in a multitude of forms, connected by their moral repugnancy. It is the purview of academics to present a framework for addressing these wrongs. Janna Thompson's work provides the necessary historical lens through which injustices must be seen and present grievances evaluated. However, her tendency to ascribe minimal condemnation to the act of injustice itself undermines the apparent severity of the crime. Additionally, Thompson's framework was proven to be primarily motivated by self-serving interests, rather than from an authentic desire to recompense historical wrongs. In contrast, the work of Richard Vernon proved to be fundamentally victim-centric. His position is the reflection of a universalist position of justice, which was demonstrated to be an inappropriately ahistorical approach. By examining Vernon's 'pool yard' thought experiment, it became apparent that greater emphasis must be placed on the inherent wrongness of specifically unjust acts. This led to the notion of double disutility, which was used in reference to the additional suffering an individual experienced by virtue of having a morally repugnant act perpetrated against them. Taken together, these arguments serve to illustrate the assertion of this paper that it is never appropriate to respond 'it was a long time ago' when one is confronted with the reality of past injustices. The moral repugnancy of inhumane acts always demands proper respect and atonement no matter how far removed from the initial event one becomes.

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INTERNATIONAL RELATIONS

Vacillating on Darfur: Achieving Peace and Security in Sudan's Forsaken West

By Larissa Fulop

Introduction

Darfur is Sudan's westernmost province, bordering Chad to the west and the Central African Republic (CAR) to the south. Since violence erupted in early 2003, the Government of Sudan's (GoS) indiscriminate aerial bombings, military attacks and raids by government-backed militias have claimed more than 300,000 lives and have displaced millions internally and internationally.¹ The situation has been termed "the world's worst humanitarian crisis" and even "genocide" by the United Nations and the United States respectively.² These contending descriptions have significant implications for the varying degrees to which institutions and states have weighed the expediency of intervention, at times giving way to incoherent international responses and distracting from the reality of grave human suffering. Darfur's ethnic composition is extremely complex, just like that of greater Sudan and of many other regions within the African continent. Consequently, it is both difficult and problematic to define victim and perpetrator groups. For the purposes of this essay, perpetrator and victim groups will be referred to as Arab and Black African respectively for the sake of clarity and consistency although, as will be explained below, such a dichotomy does little to explain the true nature of the conflict in Darfur.

The new dynamics of African conflicts have increasingly demanded inquiry, and the ostensible necessity for international intervention as a means of mediating violence and, most recently, of post-conflict capacity building, has shed new light on the value of peacekeeping. UN peacekeeping was initially conceived of as a means of quelling Cold War era proxy wars, and its

¹ Samuel Totten, "Genocide in Darfur, Sudan," in *Centuries of Genocide: Essays and Eyewitness Accounts*, ed. Samuel Totten and William S. Parsons (New York: Routledge, 2012): 513.

² Jennifer L. De Maio, "Is War Contagious? The Transnationalization of Conflict in Darfur," *African Studies Quarterly* 11, no. 4 (2010): 31.

use has surged in subsequent decades.³ In the context of conflict in Darfur, inadequate resources, ambiguous mandates, and Sudan's opposition to a more robust UN-directed peacekeeping mission have all impeded efficient conflict resolution. Although 'African solutions to African problems' may elicit greater respect for sovereignty and domestic self-determination, the monopolization of power in Khartoum and the relative unrepresentativeness of non-ethnic Arab groups in politics and social life limit the potential for a comprehensive solution at the local level. Regional and international policies must therefore forge ahead in concert in Darfur so as to secure legitimate resolve for victims and accountability for perpetrators.

I. Problem Definition

Conflict in Darfur continues to defy solution despite ongoing efforts by the AU and the UN to resolve it. The first prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, issued an arrest warrant for Sudan's president Omar al-Bashir in 2009 on charges of genocide, crimes against humanity, and war crimes committed in the region since 2003.⁴ Controversy over whether the events constitute a *de facto* genocide notwithstanding, the reality of mass killings, internal and external displacement, rape, property destruction, and looting necessitates a durable response at both the national and international level. Although the UN is cognizant of its responsibility to guide the international community into protecting civilian populations from mass atrocities, the question remains whether the organization is doing enough to abate the violence.

The present conflict in Darfur can be said to have begun when rebel groups expressed their disdain for the Sudanese government's apparent preferential treatment of certain ethnic

³ Oldrich Bures, "Regional Peacekeeping Operations: Complementing or Undermining the United Nations Security Council?" *Global Change, Peace & Security* 18, no. 2 (2006): 85.

⁴ ICC, Situation in Darfur, Sudan, available at <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/>.

groups over others by taking up arms in 2003.⁵ The Sudan Liberation Movement (SLM) and the Justice and Equality Movement (JEM) were soon thereafter confronted by a Janjaweed counter-insurgency operative, and an unprecedented wave of ethnic violence ensued.⁶ The Janjaweed and GoS troops have together been complicit in carrying out the killing and rape of black Africans and the destruction of black African villages. The joint campaigns involve bombings by GoS aircraft, followed by ground attacks by Janjaweed on camels or horses, or incursions by vehicle. Both have exercised “scorched earth” policies in an attempt to quell the rebellion, with the ultimate aim of eliminating any potential support base for the JEM and SLM.⁷ By June 2005, the number of “war-affected” civilians—accounting for all those displaced, malnourished, raped, or killed—had reached upwards of 2.9 million.⁸ To date, it is estimated that between 300,000 and 400,000 people have been killed outright or have otherwise died as result of starvation, dehydration, physical and psychological injuries, and rape as a result of ongoing conflict in Darfur.⁹ Various attempts at formulating viable cease-fire and peace agreements have dissolved into novel dimensions of conflict involving new regional actors, making for a progressively more sizeable and grave security situation.¹⁰

The African Union Mission in Sudan (AMIS) was an AU peacekeeping force operating in Darfur with approximately 150 troops by mid-2005. Its numbers subsequently increased to approximately 7,000.¹¹ Under UN Security Resolution 1564, AMIS was to “closely and continuously liaise and coordinate [its work]...at all levels” with the United Nations Mission in Sudan (UNMIS) and was mandated to protect civilians who were the prime targets of the GoS

⁵ Cristina G. Badescu and Linnea Bergholm, “The Responsibility to Protect and the Conflict in Darfur: The Big Let-Down,” *Security Dialogue* 40, no. 3 (2009): 289.

⁶ *Ibid.*, 294.

⁷ Katherine Pounds Taber, “Bringing Peace to Darfur: Lessons of the Darfur Peace Agreement,” *Houston Journal of International Law*, 31, no. 1 (2008): 183.

⁸ Badescu and Bergholm, “The Big Let-Down,” 294.

⁹ Totten, “Genocide in Darfur, Sudan,” 513.

¹⁰ Badescu and Bergholm, “The Big Let-Down,” 299.

¹¹ *Ibid.*, 298.

and its allied militia.¹² However, owing to fiscal shortfalls and a deficiency of AMIS personnel on the ground, the mission was unable to effectively contain the violence.¹³ AMIS' mandate was extended recurrently throughout 2006 as the Darfur crisis continued to escalate, until it was supplanted by the African Union/United Nations Hybrid operation in Darfur (UNAMID) under UN Resolution 1769 in 2007.¹⁴ Despite a force upwards of 26,000, UNAMID continues to grapple with uncertainties and ambiguities similar to those faced by AMIS with regard to its mandate, availability of personnel, and sources of funding.¹⁵

II. Problem Consequences

In addition to Darfur's tremendous death toll and undeniable human suffering, the conflict at present has grave political, environmental, social, and economic consequences for both internal and external security dynamics that must be taken into consideration in advance of strategizing possible policy options and recommendations. Darfur's landlocked location in northeast Africa is an environment of scarce potable water and declining wildlife populations, susceptible to soil erosion, desertification, and periodic droughts.¹⁶ In addition to ethnic, tribal, and religious disparity, a harsh climate and resource scarcity have each necessarily contributed to the protracted, multidimensional nature of the conflict. Armed conflict tends to generate considerable environmental damage, and the scorched earth tactics employed by the GoS and the Janjaweed have devastated farming lands and have further reduced what few trees exist in the region.¹⁷ An augmented loss of fertile land in a region that is already predominantly arid only creates increased difficulties for the local population to sustain itself. Furthermore, massive

¹² Allan Vic Mansaray, "AMIS in Darfur: Africa's litmus test in peacekeeping and political mediation," *African Security Review* 18, no. 1 (2009): 42.

¹³ *Ibid.*, 43.

¹⁴ Ademola Abass, "The United Nations, The African Union, and the Darfur Crisis: Of Apology and Utopia," *Netherlands International Law Review* 54, no. 3 (2007): 433.

¹⁵ *Ibid.*

¹⁶ Taber, "Bringing Peace to Darfur," 175.

¹⁷ *Ibid.*, 183.

levels of internally displaced persons (IDPs) have had significant implications for environmental degradation as migration routes are overwhelmed and blocked, leading to overgrazing in areas where livestock become concentrated.¹⁸

The spillover of conflict and, correspondingly, refugees, into neighbouring Chad and CAR threatens regional stability and has grave implications for international security dynamics. For the past two years, Chad has hosted over 200,000 evacuees fleeing conflict in Darfur.¹⁹ Accordingly, competition over resources has engendered animosity between local Chadians and Darfurian refugees. The former observe as food aid, literacy programs, vocational training, and health services administered by humanitarian organizations such as the Red Cross are delivered to the benefit of the latter. According to Haoua Mahamat, a villager nearby Breidjing camp in eastern Chad, “the refugees get food regularly...That’s nice for them. But [the Chadians] don’t have anyone who will give [them] food. [They] have nothing.”²⁰ In light of fresh violence and attacks on refugee camps in both Darfur and eastern Chad, the Chadian government declared a state of emergency in 2006 in the eastern provinces of Ouaddai, Salamat, and Wadi Fira, as well as in the capital, N'djamena; both Chad and CAR have called for the deployment of international troops to secure against cross-border raids as Sudan continues to use neighbouring territories to stage attacks.²¹ While the Chadian government has accused Sudan of "exporting the Darfur conflict," Sudanese officials conversely claim that the government of Chad provides resources and logistic support for Darfur rebels.²²

¹⁸ Totten, “Genocide in Darfur, Sudan,” 518.

¹⁹ De Maio, “Is War Contagious?” 30.

²⁰ Totten, “Genocide in Darfur, Sudan,” 516.

²¹ Julia Fitzpatrick, “Darfur: Chad Declares State of Emergency due to Attacks in Darfur and Eastern Chad,” Citizens for Global Solutions, 2006, available at http://archive2.globalsolutions.org/issues/darfur_chad_declares_state_emergency_due_attacks_darfur_and_easte rn_chad.

²² Ibid.

A socioeconomic upshot of massive displacement in Darfur is manifest in the repopulation of Fur, Masalit, and Zaghawa vacated lands by Arab and other African groups.²³ Approximately one-fourth of all Darfurian villages—predominantly peripheral areas with fair access to surface water and fertile soils and from where many targeted tribes have fled—have been settled by these new populations.²⁴ Clashes between cultivators and nomads over land and grazing rights have become more commonplace as customary land tenure in Darfur, an amicable system of reciprocated community contributions²⁵, becomes supplanted by modern developments and political manipulation. Traditional Darfurian law stipulates that land unoccupied for two to three years is to be considered uncultivated and as such can be claimed by newcomers; it would not seem altogether unreasonable for Arab or other African groups to make claims to land in the apparently abandoned villages that they have come to occupy.²⁶ Infrastructure development and the planting of new crops would give these newcomers rights to the land even under customary law. However, this situation is untenable and particularly problematic within a context of conflict and displacement since Darfurians' abandonment of their land was largely un-willful and illegally induced.²⁷ The destruction of livelihoods and the prevalence of land reallocations have daunting implications for interregional conflict dynamics. As such, the restoration of rights to land will both frustrate and necessarily pervade the post-conflict security agenda.

III. Probable Causes

Ambiguity surrounding a conflict's root causes undoubtedly results in uncertainty when contemplating sustainable solutions. Thus, an understanding of historic precursors can lend

²³ Ola Olsson, "After Janjaweed? Socioeconomic Impacts of the Conflict in Darfur," (working paper, University of Gothenburg, School of Business, Economics, and Law, 2010): 16.

²⁴ Olsson, "After Janjaweed?" 9.

²⁵ *Ibid.*, 5-6.

²⁶ *Ibid.*

²⁷ Totten, "Genocide in Darfur, Sudan," 515.

valuable insight into Darfur's regional conflict dynamics at present. Critical to an analysis of the root causes of conflict in Darfur is what de Waal has termed "international categorizing."²⁸ He posits that the African-versus-Arab dichotomy exploited by the media and academics alike is an "erroneous category transfer" from the north-south conflict that has fueled regional tensions based on a flawed interpretation of ethno-political dynamics.²⁹ Although "African" and "Arab" are commonly used to describe and explain the conflict, neither term does justice to the diversity and interconnectedness of Darfur's ethnic and racial groups. These classifications have become integrated identity determinants employed by the international community when referring to the conflict in Darfur, and have even been appropriated by the Sudanese government, the Janjaweed, the SLM, and the JEM to substantiate their respective agendas.³⁰ The incorporation of Darfur into the Republic of Sudan has had significant implications for identity formation in terms of Darfurians' often forced abandonment of past ethnic histories and their absorption of new Sudanese ones.³¹ These simplified but historically complex identities at the base of sociopolitical tensions in the region can be viewed in part as a product of Darfur's militarization within the context of globalization.

Marginalization and neglect as a result of Darfur's forcible assimilation into greater Sudan have persisted long after Sudan's independence in 1956, and have significant implications for conflict dynamics at present.³² Darfur was an independent sultanate dominated by the Fur people for several hundred years, and only became incorporated by Anglo-Egyptian forces in 1916.³³ The current crisis in Darfur has its origin in struggles for control over national wealth and power between Sudan's central government and its peripherals, with ancient disputes over

²⁸ Alex de Waal, "Who are the Darfurians? Arab and African Identities, Violence, and External Engagement," *African Affairs* 104, no. 415 (2005): 187

²⁹ Ibid.

³⁰ Ibid., 197.

³¹ Ibid., 203.

³² Theo Neethling, "Working Towards an African Peacekeeping Capability: Key Issues, Challenges, and Dilemmas in Darfur," *South African Journal of Military Studies* 34, no. 2 (2006): 102.

³³ Taber, "Bringing Peace to Darfur," 178.

land and water rights sparking renewed hostility between Arab and African groups.³⁴ Located in the northern region of Khartoum, the GoS has historically recruited labour and exploited resources from the south and west. The colonial economy has indelibly left its mark on modern Sudan; state resources are at present either centralized in Khartoum or oriented to international export.³⁵ Although Khartoum comprises less than 5% of Sudan's total population, it essentially controls all aspects of political, economic, social, and cultural life.³⁶ British colonial policy favoured the northern 'Arab' Sudanese over 'African' Sudanese from the south and west, owing to their alleged greater physical and behavioural likeness.³⁷ Accordingly, power was vested in the north upon decolonization and continues to be arbitrarily denied to those in the south and west.³⁸ The fact that virtually all government, security, and judicial positions are occupied by Sudanese from the north has meant that inter-group discrepancies are not dealt with equitably, since decisions tend to be moderated by authorities partial to Arab populations.³⁹

The authoritarian nature of Omar al-Bashir's political agenda as aligned with an ideology of Arab supremacy is a fundamental source of conflict in Darfur at present. The Sudanese government began to support the formation of an "Arab Alliance" so as to control and debase non-ethnic Arabs in Darfur.⁴⁰ Al-Bashir has in part pursued Colonel Gaddafi's desire for an "Arab belt" throughout the Sahel by arming nomadic Arab tribes such as the Janjaweed and directing them to institute their dominion in ethnically diverse Darfur.⁴¹ The political disenfranchisement and physical violence experienced by non-ethnic Arabs led to the formation of the JEM and SLM, both of which have responded with aggression to GoS and Janjaweed

³⁴ Totten, "Genocide in Darfur, Sudan," 521.

³⁵ Ibid.

³⁶ Totten, "Genocide in Darfur, Sudan," 521.

³⁷ Taber, "Bringing Peace to Darfur," 176.

³⁸ Ibid.

³⁹ Totten, "Genocide in Darfur, Sudan," 522.

⁴⁰ Taber, "Bringing Peace to Darfur," 179.

⁴¹ De Waal, "Who Are the Darfurians?" 197.

military campaigns in pursuit of equitable development, land rights, social and public services, democracy, and regional autonomy.⁴²

Ambiguities surrounding mission mandates, together with the multifariousness of force constituents, have frustrated UN peacekeeping efforts in Darfur. Because they exemplify a compromise between the disparate interests of assorted stakeholders, including those of the bellicose state itself, peacekeeping mandates can be vaguely articulated and, as such, can fail to provide UN military personnel with clear directives.⁴³ The reality of customary international law inclined toward state sovereignty not only contributes to the vagueness of mandates, due to a lack of communication and coordination with both victims and perpetrators of violence, but also physically impedes the work of peacekeepers in terms of their access to conflict regions.

IV. Policy Options and Recommendations

In an apparent effort to achieve peace, the GoS and Darfur's rebel groups entered into AU-directed peace negotiations in both 2006 and 2011. The 2006 Abuja Agreement, signed by the GoS and the SLM required that the Sudanese government carry out the disarmament and demobilization of Janjaweed militia by mid-October of that year.⁴⁴ It also placed restrictions on the movement of the government militia and stipulated that former combatants be supported through education and vocational training programs.⁴⁵ The 2011 Doha Agreement between the GoS and the Liberation and Justice Movement created a compensation fund for victims, allowed for the President of Sudan to appoint a Vice-President from Darfur, and established a Regional Authority to administer internal and external affairs until Darfur's status within the Republic of

⁴² Taber, "Bringing Peace to Darfur," 180.

⁴³ Bures, "Regional Peacekeeping Operations," 97.

⁴⁴ Taber, "Lessons of the Darfur Peace Agreement," 173.

⁴⁵ Ibid.

Sudan can be officially determined.⁴⁶ The failure of each agreement, however, can be attributed to insincerity and inflexibility, largely on the part of the GoS; peace talks are effectively at a deadlock as Khartoum refuses to concede to enhanced security arrangements for vulnerable groups and continues to deny JEM and SLM political integration.⁴⁷

De Waal calls for greater recognition on the part of the Sudanese government for the unique assets that Darfurians can bring to the Republic of Sudan as a means of tempering inter-group animosity.⁴⁸ This would require a fundamental paradigm shift in how Darfurians are perceived by greater Sudan. But reformulating decades of entrenched identity politics would at present be both unproductive and unsuccessful, as it would do little to meet the immediate needs of victims. A more pragmatic means of addressing issues of identity and representation in Darfur might involve the inclusion of a greater number of diverse social groups in formal peace negotiations, such as civil society representatives and tribal leaders, as opposed to continued bilateral talks between the GoS and select rebel factions.

There has been widespread support among African leaders and various scholars of African issues for ‘African solutions to African problems’ in the Darfur context. Local initiatives are claimed to work more effectively than foreign-devised strategies that tend to discount native cultures and ethnic realities. The AU has actively responded to a number of African conflicts since the establishment of the Peace and Security Council (PSC) in 2003, initially engendering optimism for its value as an effective deterrent.⁴⁹ However, the deployment of AMIS in Darfur has exposed a number of limitations as regards to dispatching and sustaining a robust AU peace operation in a climate of acute hostility. AMIS’ restricted mandate and fiscal shortfalls, along with fragmented cooperation on the part of the Sudanese government, unrelenting rebel

⁴⁶ Saka Luqman and Omede A. J, “From AMIS to UNAMID: The African Union, The United Nations and the Challenges of Sustainable Peace in Darfur, Sudan,” *Canadian Social Science* 8, no. 1 (2012): 66.

⁴⁷ *Ibid.*, 63.

⁴⁸ De Waal, “Who are the Darfurians?” 187.

⁴⁹ Mansaray, “AMIS in Darfur,” 36.

activities, and political divisions within the AU itself have all contributed to the AU's inability to singularly quell conflict in Darfur.⁵⁰

It can be reasonably argued that inter-state frameworks serve as effective models for peacekeeping missions since they afford greater operational flexibility, reduce intra-constituency tensions owing to their social and political inclusiveness, and elicit greater funding since they more directly implicate various states' particular geopolitical interests.⁵¹ Although imperfect, UNAMID's hybridity as both a UN and AU orchestrated mission makes it more apt to deal with conflict in Darfur. The AU's peacekeeping inadequacies have compelled even proponents of African solutions to turn to alternative security measures, namely to external assistance from a UN-backed mission.⁵² Since the AU does not have the requisite number of skilled troops and civilian personnel, there will be critical shortfalls in training, equipment, logistics, and administrative capacities if a wholly regional solution is pursued.⁵³

Yet, the deployment of a UN-backed mission does not in and of itself constitute a sufficient security solution, and its own inadequacies must be taken into account. UNAMID remains highly dependent on AU recruits and has deployed inadequately equipped personnel, often at the counsel of the GoS, which has attempted to maintain maximum control over the mission's activities.⁵⁴ It is both paradoxical and perilous to favour a regional solution that plays into the interests of a regional perpetrator. A more useful policy option requires that the AU come to recognize its own shortcomings and be open to foreign assistance that, although perhaps perceived as an encroachment on African sovereignty, might do more for victims both now and in the long term. It is difficult to predict the full potential of UNAMID's success since it has not

⁵⁰ Mansaray, "AMIS in Darfur," 37.

⁵¹ Oldrich Bures, "Regional Peacekeeping Operations: Complementing or Undermining the United Nations Security Council?" *Global Change, Peace & Security* 18, no. 2 (2006): 85.

⁵² Mansaray, "AMIS in Darfur," 39.

⁵³ Eric Reeves, "Failure to Protect: International Response to Darfur Genocide," *Harvard International Review* 29, no. 4 (2008): 83.

⁵⁴ Reeves, "Failure to Protect," 84.

been provided with the necessary number of troops and much needed logistics. The lack of command and control among an increasing number of rebel groups within Darfur makes for a volatile security environment for both the peacekeepers and the Darfurians they are mandated to protect.⁵⁵ For UNAMID to make any significant impact on the ground, its operational capacity must be improved to the highest degree. This would involve, for example, providing the necessary aircraft to move troops to and around Darfur, the provision of adequate vehicles for day and night patrols, and a greater security presence around refugee and IDP camps.⁵⁶

The 2.7 million people displaced from Darfur will likely want to return to their villages once peace has been secured. Any successful and lasting reconstruction of Darfur will have to involve land reforms that all major groups can somehow come to agree upon. Institutions that draw and build upon the inclusivity of customary land laws that allow for the sharing of land between old and new agricultural groups in relative harmony stand the greatest chance of reaching general success.⁵⁷ Information collected by humanitarian agencies on the ground could be an important aid in the process of agreeing on borders and migratory routes and for monitoring developments on the ground post-conflict.⁵⁸

Foreign powers such as China and Russia, each with permanent seats on the UN Security Council, continue to support Khartoum through arms sales and greatly undermine efforts to make significant gains in Darfur.⁵⁹ These trade alliances exist at the expense of Darfurian civilians as the weapons are used to commit grave human rights abuses against them. As advocated by Amnesty International's military and policing expert Brian Wood, "all international arms

⁵⁵ Neethling, "Working Towards an African Peacekeeping Capability," 105.

⁵⁶ Mansaray, "AMIS in Darfur," 45.

⁵⁷ Olsson, "After Janjaweed?" 16.

⁵⁸ Ibid.

⁵⁹ Mansaray, "AMIS in Darfur," 44.

transfers to Sudan should be immediately suspended and the UN arms embargo extended to the whole country” in order to prevent further violations.⁶⁰

The implementation of Responsibility to Protect principles (R2P) by the international community has met significant challenges in the context of Darfur. Political shortcomings inherent in the R2P framework, moral considerations about the use of military force, and the challenges of regional coordination between international actors and local AU powers have all contributed to a climate of uncertainty and restraint.⁶¹ To date, the ICC has issued indictments against six perpetrators in addition to its warrant for arrest against al-Bashir.⁶² Despite UN Security Council insistence, the Government of Sudan has refused to comply with the warrants.⁶³ While this does not negate the ICC’s role as a powerful international deterrent, alternative means of bringing justice and resolve for victims must be sought in the meantime, as indictments and prosecutions require time and extensive resources. A reassessment of diplomatic protection—that is, a shift from sovereignty as control to sovereignty as responsibility—supports a case for more robust international intervention.⁶⁴ UNAMID’s future success ultimately comes down to the political will of states in the international community to procure and supply the resources necessary for its mandate and to support the AU in its local initiatives. This garnering of political will implies a more firm direction from the UN, which must begin to live up to its stated aim of maintaining international peace and security before both it and Darfur become irrelevant.

⁶⁰ Amnesty International, *Darfur: New Weapons from China and Russia Fuelling Conflict*, available at <http://www.amnesty.org/en/news/darfur-new-weapons-china-and-russia-fuelling-conflict-2012-02-08>.

⁶¹ Badescu and Bergholm, “The Big Let-Down,” 287.

⁶² ICC, *Situation in Darfur, Sudan*, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/>.

⁶³ *Ibid.*

⁶⁴ Badescu and Bergholm, “The Big Let-Down,” 288.

Conclusion

The complex rootedness of conflict dynamics in Darfur frustrates the devising of durable solutions at both the local and international level. As such, any compromise must account for the diversity of both Darfur and wider Sudan. Given the multifarious nature of the region's politics, economics, and ethnic groups, a peaceful future for Darfur must involve greater power and resource sharing. Not only does this mean that the GoS will need to be more flexible towards and representative of Darfurian interests, but together with the AU it will need to be more receptive of international assistance. These will be decisive steps towards fostering international law and security in Darfur.

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Symbol or Strategic Constraint?: The Implications of the EU Arms Embargo for EU-China Relations and China's Strategy

By Ross Linden-Fraser

The relations between the European Union (EU) and China have developed remarkably quickly since the end of the Cold War. In the economic sphere, this has been particularly notable: trade has increased more than tenfold between 1994 and 2010 to over \$500 billion, and commerce has expanded so far that the EU is currently China's largest trading partner, with China as the EU's second-largest, behind the United States.⁶⁵ However, China-EU ties have also been marked by a number of political disagreements, particularly after the Chinese government's crackdown on student protesters at Tiananmen Square in 1989. In response to the event, the European Community (EC)—the EU's predecessor organization—imposed an arms embargo. This sanction has become one of the most prominent irritants in an otherwise increasingly positive relationship. The effectiveness and even the very purpose of the embargo have been hotly debated, and at times even EU member states have advocated lifting the ban on arms sales. The purpose of this paper is to determine whether the arms embargo has a significant impact on EU-China relations in general and to examine how it contributes to understanding China's international strategy. The future of the arms embargo will also be briefly considered. It is argued here that the EU's arms embargo against China has had very little negative impact on China-EU relations, in part because the embargo represents more of a symbolic blow to China's international status than a practical constraint on China's growing power. It seems unlikely that the EU's embargo will be lifted at any time in the near future.

This paper will examine various facets of the EU arms embargo, which can broadly be divided into four separate sections. The first consists of a review of the history and mechanics of

⁶⁵ Robert G. Sutter, *Chinese Foreign Relations: Power and Policy since the Cold War*, 3rd ed. (Lanham: Rowman & Littlefield Publishers, 2012), 289.

the embargo, including an overview of the positions of the EU's institutions, its member states and other major international actors on the arms sales ban. The second is an assessment of China's campaign to end the embargo and the impact of the embargo on China-EU relations more broadly. The third section of this paper addresses China's views of the embargo and what this suggests about the nature of its global strategy. Finally, the paper concludes by considering the likelihood that the embargo will be lifted.

The complex mechanics of the arms embargo and the EU's institutional makeup have created difficulties for unifying EU policy on the arms ban, although in recent years there has been progress in developing conformity. Of particular importance is the fact that the ban, which was instituted by a statement of the European Council, is not legally-binding.⁶⁶ In 1998, in an effort to restrict the possibility that member states would continue arms exports to China, the EU created the Code of Conduct on Arms Exports. Although also legally non-binding, the Code of Conduct contains four nominally obligatory clauses that prohibit the sale of arms in certain cases: if they might be used for internal repression, provoke internal conflicts or encourage aggression against other states, or if sales contravene UN or international restrictions.⁶⁷ The development of a binding foreign policy has been a longstanding challenge for the EU. The creation of the EU in 1992 also involved the establishment of a Common Foreign and Security Policy (CFSP), but member states have always been able to act independently of this arrangement. Nonetheless, EU members can be obliged to harmonize certain policies with the CFSP, with the unanimous adoption of a *Joint Statement* or a *Common Position* by the EU

⁶⁶ "The European Council strongly condemns the brutal repression taking place in China . . . it thinks it necessary to adopt the following measures . . . interruption by the Member States of the Community of military cooperation and an embargo on trade in arms with China", European Council, *European Council Declaration on China*, Madrid, 26–27 June 1989

⁶⁷ Terry Narramore, "China and Europe: engagement, multipolarity and strategy", *The Pacific Review* 21:1 (2008): 98.

Council of Ministers.⁶⁸ The EU has taken some steps towards more binding standards for the arms embargo, including the adoption of a Common Position in 2003, which was intended to prevent the circumventing of UN, OESAC and EU arms embargoes.⁶⁹ In 2008, the EU Council of Ministers agreed to a Common Position that replaced the 1998 Code of Conduct, making it legally binding.⁷⁰ Any action to lift the embargo would also require the unanimous consent of the EU member states' governments, making it more difficult to remove.⁷¹

There are a variety of actors and interests involved in the EU arms embargo issue, including EU member states advocating the end of the embargo; however, as a result of continued opposition within the EU, as well as pressure from its allies, the embargo has remained in place.⁷² The first EU movement against the ban on arms sales began in 2003 after China first called for the lifting of the embargo in its *EU Policy Paper*.⁷³ Shortly after its publication, both French President Jacques Chirac and German Chancellor Gerhard Schröder indicated that they would support the removal of the embargo. The leaders suggested that the embargo no longer reflected the situation in China, with President Chirac calling it “outdated”.⁷⁴ The movement to repeal the embargo continued to gain momentum until May 2005, when China's *Anti-Secession Law* was passed, threatening war against Taiwan if it declared independence. At this point, the European Parliament and other member states made clear their

⁶⁸ Carol M. Glen and Richard C. Murgu, “EU-China relations: balancing political challenges with economic opportunities”, *Asia Europe Journal* 5 (2007): 333-334, accessed November 23, 2012, doi: 10.1007/s10308-007-0121-7.

⁶⁹ Nicola Casarini, “The International Politics of the Chinese Arms Embargo Issue”, *The International Spectator* 42:3 (2007) 377; Council of the European Union, “Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering”, *Official Journal of the European Union* L56 (June 25, 2003): 80.

⁷⁰ Council of the European Union, “Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment” *Official Journal of the European Union* L335 (December 13, 2008): 100.

⁷¹ Glen and Murgu, “EU-China relations: balancing political challenges with economic opportunities”, 336.

⁷² Narramore, “China and Europe: engagement, multipolarity and strategy”, 101.

⁷³ “China's EU Policy Paper”, *Ministry of Foreign Affairs of the People's Republic of China*, October 13, 2003, accessed November 22, 2012, <http://www.fmprc.gov.cn/eng/topics/ceupp/t27708.htm>.

⁷⁴ Casarini, “The International Politics of the Chinese Arms Embargo Issue”, 375.

opposition to lifting the embargo, and all negotiations stalled.⁷⁵ France continues to support the end of the embargo and has, to an extent, circumvented the Code of Conduct by interpreting it relatively loosely. In the past, the UK, Czech Republic and Italy took similar positions by considering certain goods with potential military applications to fall outside of the purview of the Code of Conduct.⁷⁶

However, in recent years, most EU members have harmonized their policies with the new Common Position, leaving France as the only major state contravening the embargo. According to the most recent EU report on arms exports, in 2010 the EU sold €217.5 million of arms licenses to China, of which €196.3 million were sold by France, while former major exporters the UK and Italy sold only €18 million and €0.65 million, respectively. During the same year, France also supplied €68.4 million of military equipment to China, out of the EU's total exports of €69.5 million.⁷⁷ Since the election of Chancellor Angela Merkel in 2005, Germany has reversed its position and now rejects the ending of the embargo, as has the UK since the election of Prime Minister David Cameron. The Netherlands and the Scandinavian countries have continued their opposition to lifting the ban, citing concerns over China's human rights record and possible aggression against Taiwan.⁷⁸ The directly-elected European Parliament has also repeatedly urged the Council of Ministers not to end the embargo.⁷⁹

With the exception of China, the most important external influences upon the embargo are the United States and Japan, and both oppose any move to end it. In early 2005, when it appeared that the EU might lift the embargo, the US Congress voiced serious concerns, including

⁷⁵ Stanley Crossick, "The Arms Embargo: EU Perspective", in *China-EU: A Common Future*, ed. Stanley Crossick and Etienne Reuter (Hackensack: World Scientific Publishing), 190-191.

⁷⁶ Casarini, "The International Politics of the Chinese Arms Embargo Issue", 376.

⁷⁷ EU Annual Arms Export Report, 2011, p. 350-351.

⁷⁸ Glen & Murgu, "EU-China relations: balancing political challenges with economic opportunities", 337-338; James Kirkup, "Britain prepared to block Eurozone move to relax arms embargo on China" *The Daily Telegraph*, November 4, 2011, accessed November 26, 2012, <http://www.telegraph.co.uk/news/politics/8868652/Britain-prepared-to-block-Eurozone-move-to-relax-arms-embargo-on-China.html>.

⁷⁹ Jing Men, "Between Human Rights and Sovereignty – An Examination of EU-China Political Relations", *European Law Journal* 17:4 (2011), 547.

threats to ban arms technology exports to Europe. The US is particularly worried about the possibility that China might obtain advanced military technology, which would upset the balance of power in the Taiwan Strait and other areas of concern to the American military. It also shares the concerns of many European states that China would use EU arms for repression or the abuse of human rights.⁸⁰ The US is perceived as a particularly important influence over the EU: Mingjiang Li argues that China believes the US to have played a “decisive role” in blocking the end of the embargo.⁸¹ Japan, the EU’s closest ally in East Asia, has joined the US in opposing any move to allow European arms sales to China. In 2005, it combined its efforts with those of the US in pressuring the EU to maintain the ban. Both states continue to contribute to the already significant forces within the EU opposed to lifting the embargo.⁸²

It is important in this assessment of the EU arms embargo to consider its impact on the relations between China and the EU. Where diplomatic ties are concerned, the arms embargo does not appear to have damaged the relationship between both actors. While China has kept the arms embargo on the table and consistently pushed for its repeal, its campaign to lift the ban on arms sales has largely taken the form of public statements and bilateral talks rather than any concrete steps to limit ties. As previously noted, China first called for the lifting of the arms embargo in 2003. China’s views, expressed in its *EU Policy Paper*, suggested that the embargo was a limit to closer ties rather than a threat to existing relations. The paper states that lifting the embargo would “remove barriers to greater bilateral cooperation in defence industry [sic] and technologies”.⁸³ It is worth noting, as Stanley Crossick argues, that China did attempt to place pressure on the EU to lift the ban in 2004, suggesting that maintaining it could harm relations.⁸⁴

However, such threats are anomalies rather than the general trend. Although China has

⁸⁰ Crossick, “The Arms Embargo: EU Perspective”, 191-192.

⁸¹ Mingjiang Li, “China-Eu Relations: Strategic Partnership at a Crossroads”, *China: An International Journal* 7:2 (2009): 240.

⁸² Narramore “China and Europe: engagement, multipolarity and strategy”, 101.

⁸³ “China’s EU Policy Paper.”

⁸⁴ Crossick, “The Arms Embargo: EU Perspective”, 190.

continued to call for the embargo to be removed, both parties have generally avoided allowing the embargo to overshadow the positive aspects of their relations. In the Joint Statement issued following the seventh EU-China Summit of 2004, the EU “confirmed its political will to continue to work towards lifting the embargo”.⁸⁵ It made a similar statement following each of the three next EU-China Summits.⁸⁶ This trend of preventing criticism on the embargo from affecting the overall emphasis on positive relations continued at the 15th China-EU Summit in 2012. In a statement at the conference, Chinese Premier Wen Jiabao called for the ban to be lifted, saying that he regretted that “the solution has been elusive”.⁸⁷ However, the Joint Communiqué issued following the summit did not mention the embargo, but instead consisted of various positive statements including where the parties “noted with satisfaction that the EU-China Comprehensive Strategic Partnership had matured and become increasingly rich and multi-dimensional.”⁸⁸

Where there have been noticeable negative trends in EU-China diplomatic ties, these trends seem to bear little relation to member states’ positions on the arms embargo, suggesting that it is a less important area of political contention than other issues. As has been demonstrated, France is the most important EU member opposed to the arms embargo and has consistently been the largest supplier of arms to China.⁸⁹ However, other political differences with China have had a much greater impact on France-China ties, suggesting the relative lack of importance of the embargo in overall diplomatic relations. In 2008, China cancelled the 11th China-EU Summit because of French President Sarkozy’s plans to meet with the Dalai Lama,

⁸⁵ Council of the European Union, *7th EU-China Summit Joint Statement*, The Hague, December 8, 2004, 2.

⁸⁶ Council of the European Union, *8th EU-China Summit Joint Statement*, Beijing, September 5, 2005, 3; Council of the European Union, *9th EU-China Summit Joint Statement*, Helsinki, September 9, 2006, 2; Council of the European Union, *10th EU-China Summit Joint Statement*, Beijing, November 28, 2007, 4.

⁸⁷ “Chinese PM urges EU to drop arms embargo”, *Al-Jazeera*, September 20, 2012, accessed November 23, 2012, <http://www.aljazeera.com/news/asia-pacific/2012/09/2012920151716621141.html>.

⁸⁸ Council of the European Union, *Joint Press Communiqué, 15th EU-China Summit: Towards a stronger EU-China Comprehensive Strategic Partnership*, Brussels, September 20, 2012, 1.

⁸⁹ Casarini, “The International Politics of the Chinese Arms Embargo Issue”, 377-378.

and it took over a year for good relations to be restored.⁹⁰ The arms embargo is also potentially less important to China because it has other major sources of arms. Currently, China can fulfill most of its need for arms by purchasing from Russia. Although the semi-monopolistic arrangement with Russia may increase prices somewhat, Nicola Casarini concludes that EU prices would be substantially higher.⁹¹ The EU Common Position on arms exports also undercuts the impetus for China to oppose the embargo. While China may desire more modern technology from Europe, it is widely acknowledged that the restrictions of the Common Position would still apply to China even if the embargo were lifted.⁹²

The arms embargo also appears to have little impact on China's economic relations with EU member states. This is symptomatic of a broader dynamic in EU-China ties, according to which neither party is willing to let their political differences affect their trade ties. Roberto Peruzzi, Arlo Poletti and Shuangquan Zhang summarize this view neatly, concluding that, "apart from rhetorical declarations, the overall positive evaluation attached to the EU's image as an economic actor [by China] is not overshadowed by contingent frictions concerning more specific issues [such as the arms embargo]."⁹³ There are many clear signs that the positions of various EU members on the arms embargo generally have little impact on their economic ties with China. While Terry Narramore suggests that China has "not been above punishing [states]" that criticize it on human rights grounds in the past, he notes that such actions have declined recently.⁹⁴ This contention is borne out by the fact that the Netherlands and Sweden are two of the most important destinations for rapidly growing Chinese Foreign Direct Investment (FDI) in

⁹⁰ Sutter, *Chinese Foreign Relations: Power and Policy since the Cold War*, 291.

⁹¹ Casarini, "The International Politics of the Chinese Arms Embargo Issue", 377.

⁹² Wang Bo, "Bilateral security relations between China and Europe", in *China, Europe and International Security: Interests, roles and prospects*, ed. Frans-Paul van der Putten and Chu Shulong (New York: Routledge, 2011), 42-43; Casarini, "The International Politics of the Chinese Arms Embargo Issue", 376.

⁹³ Roberto Peruzzi, Arlo Poletti and Shuangquan Zhang, "China's Views of Europe: A Maturing Partnership", *European Foreign Affairs Review* 12 (2007): 327.

⁹⁴ Narramore, "China and Europe: engagement, multipolarity and strategy", 94.

Europe, although both are among the main proponents of the arms embargo.⁹⁵ As mentioned above, Germany has changed its stance on the arms embargo and now opposes any possibility of lifting it. Chancellor Merkel is also vocally critical of China on a variety of other political issues.⁹⁶ Nonetheless, Germany's trade relations with China are the strongest within the EU, and their trade of €144 billion in 2011 represented a plurality of Chinese trade with the EU.⁹⁷ Furthermore, throughout the European sovereign debt crisis, China has continued to buy EU debt despite their political differences, which lends even greater credence to the notion that there is little connection between political disputes and the China-EU economic relationship.⁹⁸

Where China and the EU have indicated reservations about their trade relationship, these problems are not framed by the arms embargo debate but by other economic disagreements. Once again, this represents a broader trend of separating political and economic issues. In trade matters, the main points of contention are the EU's refusal to grant Market Economy Status (MES) to China and the trade barriers the EU has erected against Chinese products to narrow its trade deficit.⁹⁹ During the negotiations leading up to the ninth EU-China Summit in 2006, the EU presented a draft framework agreement on a China-EU strategic partnership. The draft bundled trade disagreements, such as the dispute over granting China MES, with discussion of the arms embargo and human rights issues. China rejected the draft, insisting on the separation of trade and non-trade disputes¹⁰⁰, and the separation was eventually included in the final

⁹⁵ Haiyan Zhang, Zhi Yang and Dnaiel Van Den Bulcke, executive summary of "Euro-China Investment Report 2011-2012, The European landscape of Chinese enterprises: An analysis of corporate and entrepreneurial firms and the role of the ethnic communities", *Antwerp Management School* (2012), accessed November 24 2012, http://www.antwerpmanagementschool.be/media/294010/report_exec_summ_english.pdf.

⁹⁶ Ting Wai, "EU-China Relations in the Age of Globalization and Regionalization", *EurAmerica* 41:1 (2011): 184.

⁹⁷ Kevin Yao and Andreas Rinke, "China sees trade with Germany near doubling by 2015", *Reuters*, April 23, 2012, accessed November 23, 2012, <http://www.reuters.com/article/2012/04/23/us-germany-china-idUSBRE83L08D20120423>.

⁹⁸ Li Xiaokun and Cheng Guangjin, "Beijing has faith in EU to tackle debt crisis", *China Daily*, November 6, 2011, accessed November 23, 2012, http://www.chinadaily.com.cn/business/2012-11/06/content_15878456.htm.

⁹⁹ Sutter, *Chinese Foreign Relations: Power and Policy since the Cold War*, 289-290.

¹⁰⁰ The arms embargo is considered in this paper (and in the article cited below, by Pradeep Taneja) to be a non-trade issue since it did not originate from a trade dispute but from the EU's objection to China's human rights policies

agreement, which exists today as the current Partnership and Cooperation Agreement.¹⁰¹ Even in relations with specific countries that support the arms embargo, China has refrained from linking trade to the arms ban. When Premier Wen discussed expanding trade with Germany in 2011, he tempered his remarks not by mentioning the arms embargo dispute, but by emphasizing the need for both parties to avoid protectionism.¹⁰²

While it is clearly not the most important factor in shaping EU-China relations, the EU arms embargo does provide a useful model for examining the nature of China's strategic approach to both Europe and the world at large. It provides an effective means of refuting theories that suggest that China and the EU are attempting to build a "strategic axis" that would oppose US dominance of global politics. Critics have pointed out that there is no indication that EU members are attempting to use China to balance against US power.¹⁰³ However, the arms embargo issue also suggests that even China is uninterested in a "strategic axis", as the arms embargo has contributed to China's perception that the EU is not a strategic actor.¹⁰⁴

The theory of a developing "strategic axis" between China and the EU rests on the basic premise that the EU and China's interests are converging, with the EU in particular diverging from the US on security issues. This "strategic axis" will consist of Chinese attempts to bring the EU into a multipolar world, which will ultimately limit US dominance of world affairs, while the EU will willingly participate because of its increasing differences with the US.¹⁰⁵ Insofar as the arms embargo issue is concerned, the theory is predicated on the notion that the EU will move to abolish the arms embargo, or, at the very least, that its member states will default from

¹⁰¹ Pradeep Taneja, "China-Europe relations: The limits of strategic partnership", *International Politics* 47:3/4 (2010): 377.

¹⁰² Yao and Rinke, "China sees trade with Germany near doubling by 2015."

¹⁰³ Narramore, "China and Europe: engagement, multipolarity and strategy", 101-102.

¹⁰⁴ Nicholas Rees, "EU-China Relations: Historical and Contemporary Perspectives", *European Studies* 27 (2009): 44; Jonathan Holslag, "The Elusive Axis: Assessing the EU-China Strategic Partnership", *Journal of Common Market Studies* 49:2 (2011): 310.

¹⁰⁵ David Scott, "China and the EU: A Strategic Axis for the Twenty-First Century?", *International Relations* 21:1 (2007): 39-40.

the CFSP and sell arms or dual-use¹⁰⁶ technologies to China.¹⁰⁷ However, more recent developments in the arms embargo issue pose problems for these assumptions. Firstly, as has been demonstrated, most of the EU states have moved away from supporting the lifting of the arms embargo, and the only state that continues to contravene the embargo in any meaningful way is France.¹⁰⁸ Additionally, the strengthening of EU arms exports controls into a Common Position also means that the lifting of the embargo would not likely result in an increase in arms sales.¹⁰⁹ Supporters of the “strategic axis” theory have also cited certain technology-sharing agreements as proof that the EU was allowing China to obtain advanced dual-use technologies. The most prominent of these agreements was the Galileo Project, an alternative to the American Global Positioning System (GPS).¹¹⁰ However, more recently, the EU has stopped the project as it became concerned about the project’s possible military applications and has ended its collaboration with China on the advanced technological front in general. Pressure from the US and Japan also contributed to the ending of cooperation on such programs.¹¹¹

Although the arms embargo limits the potential for China-EU strategic engagement, China for the most part does not perceive it as a constraint or threat, but rather considers it to be a symbolic blow to its prestige. It would be difficult for China to consider the embargo a strategic check, as it does not perceive the EU to be a threat or a challenge to its rise. *China’s*

¹⁰⁶ The term “dual-use” refers to technology or equipment that does not have an explicitly military purpose, but which has potential military applications (i.e. Radar)

¹⁰⁷ Scott, “China and the EU: A Strategic Axis for the Twenty-First Century?”, 34-35.

¹⁰⁸ Council of the European Union, “Thirteenth Annual Report According to Article 8(2) of Council Common Position 2008/944/CFSP Defining Common Rules Governing Control of Exports of Military Technology and Equipment”, *Official Journal of the European Union* C382 (December 30, 2011): 350-351.

¹⁰⁹ Casarini, “The International Politics of the Chinese Arms Embargo Issue”, 376; Council of the European Union, “Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment”, 100.

¹¹⁰ Ian Anthony, “Militarily relevant EU-China trade and technology transfers: Issues and problems” (paper presented at the conference on Chinese Military Modernization: East Asian Political, Economic and Defense Industrial Responses, organized by the Freeman Chair in China Studies and the Pacific Forum, both of the Centre for Strategic and International Studies, 19-20 May 2005): 4-5; Scott, “China and the EU: A Strategic Axis for the Twenty-First Century?”, 34.

¹¹¹ Nicola Casarini, “The rise and fall of China-EU relations in the field of space and defence technology”, in *China, Europe and International Security: Interests, roles and prospects*, ed. Frans-Paul van der Putten and Chu Shulong (New York: Routledge, 2011), 76-78.

EU Policy Paper, which called for the removal of the arms embargo, stated bluntly that “there is no fundamental conflict of interest between China and the EU and neither side poses a threat to the other”.¹¹² Additionally, rather than make the EU appear threatening, its inability to develop a consensus to lift the arms embargo appears to have reinforced China’s growing perception that the EU is not an effective geopolitical actor.¹¹³ Insofar as the EU is concerned, Jenny Clegg argues that, unlike the US, Europeans are relatively unconcerned by China’s increasing hard power.¹¹⁴ This further suggests that it would be wrong to characterize the arms embargo as an EU attempt to limit China’s strategic reach.

None of these points are raised to suggest that the EU wishes to strengthen China’s military; in fact, as this paper has argued, the EU has increasingly limited its members’ ability to sell arms or dual-use technology to China. However, rather than being intended as a broad strategic ‘check’ on China’s increasing power, Jing Men suggests that these moves are largely meant to show disapproval of China’s human rights record and to prevent EU members from indirectly sponsoring Chinese aggression.¹¹⁵ Where China does see the embargo as a ‘check’ on its rising strength, it tends to blame the US rather than the EU. Ruan Zongze, a scholar and former Chinese diplomat, suggests that the arms embargo “is a game that the US is manipulating to put pressure on the EU and check China, to undermine relations between China and the EU.”¹¹⁶ Consequently, rather than examining the embargo as an EU threat or strategic limit on China, it is more useful to consider the arms embargo’s relation to China’s ambitions of pursuing international status.

¹¹² “China’s EU Policy Paper.”

¹¹³ Holslag, , “The Elusive Axis: Assessing the EU-China Strategic Partnership”, 310

¹¹⁴ Jenny Clegg, “China Views Europe: A Multi-Polar Perspective”, *European Studies* 27 (2009): 132.

¹¹⁵ Men, “Between Human Rights and Sovereignty – An Examination of EU-China Political Relations”, 547.

¹¹⁶ Ruan Zongze, “China-EU-US relations: shaping a constructive future”, in *China-Europe Relations: Perceptions, Policies and Prospects*, ed. David Shambaugh, Eberhard Sandschneider and Zou Hong (New York: Routledge, 2007), 296.

Although the arms embargo is not a strategic threat, China does consider the ban important, as it characterizes China as an irresponsible state, causing it to lose face and weakening its image as a state pursuing a “peaceful rise”. Broadly, China’s main foreign policy goals are the preservation of Communist Party rule, the promotion of economic growth and the attainment of greater status in the international system.¹¹⁷ In order to achieve these aims, China has recognized that its interests are best served by not being seen as a threat and instead aiming to assure the world of its responsible nature and peaceful aims.¹¹⁸ It is worth noting that there are divergent interests within China with different aims: China’s military leadership in particular is keen to acquire more advanced technologies. However, as Jing-Dong Yuan contends, the Chinese civilian leadership’s priorities have generally taken precedence over those of the military where China’s broader national interest is concerned.¹¹⁹

China’s efforts to avoid provoking antipathy or concern therefore remain at the forefront of its approach to international affairs, and building closer ties with the EU is a central part of this ‘reassurance strategy’.¹²⁰ The symbolic meaning of the arms embargo runs directly against these aspirations, and it is this predicament that is causing China concern. In banning arms sales to China, the EU has placed the country in the same category as a variety of other irresponsible ‘pariah’ or Third-World states such as Iran, Lebanon, Myanmar, Sudan and Zimbabwe.¹²¹ Additionally, while China may not see the EU as a threat, Yong Deng notes that it is worried that the embargo indicates “suspicion” or “prejudice” against China, which implicitly limits China’s

¹¹⁷ Sutter, *Chinese Foreign Relations: Power and Policy since the Cold War*, 2-3.

¹¹⁸ Yong Deng, *China’s Struggle for Status: The Realignment of International Relations* (Cambridge: Cambridge University Press, 2008), 2-4.

¹¹⁹ Jing-Dong Yuan, “Deferring to the national interest: arms control and civil-military relations in China”, in *Chinese Civil-Military Relations: The transformation of the People’s Liberation Army*, ed. Nan Li (New York: Routledge 2006), 54.

¹²⁰ Narramore, “China and Europe: engagement, multipolarity and strategy”, 90.

¹²¹ Crossick, “The Arms Embargo: EU Perspective”, 189, Council of the European Union, *List of EU arms embargoes on arms exports, UN Security Council embargoes on arms exports and arms embargoes imposed by the OSCE, Annex I*, Brussels April 27, 2012, 2.

pursuit of greater international status.¹²² China's public statements reflect similar concerns. In November 2011, when China called on the EU to lift the ban on arms sales, its representative characterized the embargo as "[a symbol] of political prejudice and inequality".¹²³ China's preoccupation with being perceived as a peaceful, responsible state also seems consistent with the limited adverse effect of the arms embargo issue. As this paper has argued previously, China's campaign to lift the embargo has been limited largely to public statements, and has had little negative impact on diplomatic or economic ties.

Although not the most important factor affecting relations between China and the EU, the EU's arms embargo is clearly important to China strategically, and it is worth speculating on the ban's future. From the European perspective, those in favour of removing the embargo have contended that it is currently hampering relations. In 2010, the EU's High Representative,¹²⁴ Baroness Catherine Ashton, argued that the embargo should be lifted, as it was a "major impediment for developing stronger EU-China co-operation on foreign policy and security matters".¹²⁵ As noted previously with regards to *China's EU Policy Paper*, China has generally taken a similar position, suggesting that the embargo is holding back China's strategic relations with the EU.¹²⁶ Additionally, in response to Baroness Ashton's comments the Chinese ambassador to the EU stated that the only parties suffering from the arms embargo were European arms manufacturers.¹²⁷ Theorists favouring the notion of a developing "strategic axis" are also among those who believe the arms embargo will and should be lifted.¹²⁸

¹²² Deng, *China's Struggle for Status: The Realignment of International Relations*, 12

¹²³ "EU arms embargo shows political prejudice", *China Daily*, November 30, 2011, accessed November 24, 2012, http://www.chinadaily.com.cn/china/2011-11/30/content_14187588.htm.

¹²⁴ The High Representative of the Union for Foreign Affairs and Security is the de-facto foreign minister of the EU, responsible for coordinating and representing the Common Foreign and Security Policy

¹²⁵ EU Observer

¹²⁶ "China's EU Policy Paper."

¹²⁷ Andrew Rettman, "Ashton pragmatic on China in EU foreign policy blueprint", *EU Observer*, December 17, 2010, accessed November 23, 2012, <http://euobserver.com/china/31538>.

¹²⁸ David Shambaugh, "China and Europe: The Emerging Axis" *Current History* 103 (2004): 244; Scott, "China and the EU: A Strategic Axis for the Twenty-First Century?", 35.

However, there seems to be little interest or motivation for either the EU or China to support lifting the embargo. In combination with other important factors, it appears likely that the arms ban will remain in force for the foreseeable future. Firstly, as this paper has argued, there is little evidence that the EU intends to develop any form of strategic axis, and rather than move away from the arms embargo, its members' positions have generally converged against lifting it. Secondly, while it is true that the arms embargo has limited the possibility for greater strategic engagement between China and the EU, there have been no adverse effects that are likely to pressure the EU into lifting the ban. As has been shown, the economic relationship remains strong, and there is little sign that the two parties are willing to allow political differences to hamper trade.¹²⁹ The diplomatic relationship remains at least outwardly positive, as the two sides continued to emphasize the "maturation" of their ties following the most recent EU-China Summit.¹³⁰ China's arguments that the lifting of the ban would provide benefits for European arms companies is also moot, as it has been pointed out that stronger arms exports controls will preclude any significant rise in arms sales even without an embargo.¹³¹ In addition to the opposition within the EU to lifting the embargo, the US and Japan contribute to the pressure against removal of the embargo.¹³²

Although an oft-mentioned 'irritant', the continuing EU arms embargo against China is less damaging to relations than might be believed. The embargo has been strengthened in recent years, as states that formerly undermined the embargo by selling arms have generally ceased this action. Despite the strengthening of the embargo, relations between China and the EU do not appear to have been affected either diplomatically or economically. Where there have been noticeable negative effects on the relationship, they do not correspond with the embargo, but

¹²⁹ Peruzzi, Poletti and Zhang, "China's Views of Europe: A Maturing Partnership", 327.

¹³⁰ Council of the European Union, *Joint Press Communiqué, 15th EU-China Summit: Towards a stronger EU-China Comprehensive Strategic Partnership*, 1.

¹³¹ Wang, "Bilateral security relations between China and Europe", 42-43; Casarini, "The International Politics of the Chinese Arms Embargo Issue", 376.

¹³² Narramore, "China and Europe: engagement, multipolarity and strategy", 101.

with other disputes. However, while it is not necessarily the most important determinant of relations, the embargo retains a symbolic importance, which hampers China's efforts to be seen as an important and responsible state. Unfortunately for China, the limited negative impact of the ban has made it less likely that the embargo will be lifted, suggesting that it will continue to undermine China's efforts to attain greater status and be seen as a peaceful power.

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COMPARATIVE POLITICS

Mandatory Minimum Drug Sentences

By Robert Salvatore Powers

The Government of Canada is in the process of passing Bill C-10, entitled the *Safe Streets and Communities Act*.¹³³ This bill is an omnibus bill encapsulating nine initiatives of the previous Progressive Conservative Government. One aspect of the *Safe Streets and Communities Act* is the former Bill S-10; *The Penalties for Organized Drug Crime Act*.¹³⁴ This section of C-10 will impose mandatory minimum sentences (MMS) on certain drug offences. Critics of the drug portion of this bill claim that it will not be an effective tool to reduce the consumption or trafficking of illicit drugs. The purpose of this research paper is to illustrate how MMS are typically implemented for political reasons that are not necessarily the result of sound legal principles. This paper will begin with an analysis of the history and experiences that the United States of America has had with MMS. Next, the proliferation of MMS as they pertain to drug laws will be analysed, with an emphasis on constitutional issues. Finally, the similarities between current Canadian policy direction and historical US experiences will be examined.

Legislative support for MMS can be best understood in terms of a 'swing'. Over time the swing will alternate between periods of intense support, and proliferation of MMS, and periods of repeal. The United States has a long history of just such a pattern. Congress has, for example, expanded and repealed MMS based on socio-historical rationale such as slavery or alcohol prohibition.¹³⁵ The most ineffective sets of laws that contain MMS, as we will see, pertain to drug crime. Such laws are created during times of heightened public excitement on the topic and often lack a sound scientific or legal rationale. Politicians pander to a public that is excited because of a perceived national crisis. Usually the cause of public excitement is related to the

¹³³ The Government of Canada, Government of Canada Introduces the Safe Streets and Communities Act, (Ottawa: Department of Justice, 2011). *The Safe Streets and Communities Act (2011)* received Royal Assent March 13, 2012.

¹³⁴ United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Washington: *Congressional Testimony*, October 2011) 21

¹³⁵ *ibid.* Pp 7-30

media and the amount of drug-crime-related news. This trend is evident in the laws surrounding crack cocaine. Despite the fact that crack use began in earnest in the late 1970s, it was not until 1986, when skyrocketing media coverage led to a national ‘crack scare,’ that legislators began pushing for strengthened crack prohibition laws.¹³⁶ This media coverage waned in 1987 before skyrocketing again in 1988; curiously 1987 was not an election year.¹³⁷ MMS for drugs, as this paper suggests, are simply bad policy. Politicians proclaim support of MMS for drugs for political and symbolic reasons, not because legislators feel they will make a positive impact on society.¹³⁸

Mandatory minimum sentences are not a recent policy tool by any means. The United States has a very long judicial history of minimum sentences. In 1790, the Congress passed the first comprehensive federal crimes list known as the *Federal Crime Act*. It specified twenty-three federal crimes, seven of which carried a mandatory minimum penalty.¹³⁹ These MMS were reserved for the most serious of crimes and carried a mandatory punishment of death. In 1819, British law, in comparison, recognized 220 capital offenses, many having been added since the reign of the first King George in 1714.¹⁴⁰ Despite this, executions were more common in England during the early 1600s, before the expansion of death penalty crimes. With the spread of Enlightenment ideals, it became common for juries to refuse to sentence a defendant to death or for charges to be dropped because of a typographical error.¹⁴¹ Despite King George I's expansion

¹³⁶ Craig Reinerman and Harry G. Levine, *Crack in America* (University of California Press, 1997), 47.

¹³⁷ *ibid.* Pp 49.

“The crack scare began in 1986, but it waned somewhat in 1987 (a nonelection year). In 1988, drugs returned to the national stage as stories about the “crack epidemic” again appeared regularly on front pages and TV screens.”

¹³⁸ Michael Tonry, “Mandatory Penalties,” *Crime and Justice* 16, (1992): Pp 247.

“In July 1991, in the face of claims that newly proposed mandatory penalty laws would overburden the courts and have little practical effect, one congressman told the *New York Times*, [that] Congressmen and senators are afraid to vote no on crime and punishment bills, even if they don’t think it will accomplish anything.”

¹³⁹ United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Washington: *Congressional Testimony*, October 2011) 7.

“Seven of the offenses in the 1790 Act carried a mandatory death penalty: treason, murder, three offenses relating to piracy, forgery of a public security of the United States and the rescue of a person convicted of a capital crime.”

¹⁴⁰ Michael Tonry, “Mandatory Penalties,” *Crime and Justice* 16, (1992): 247.

¹⁴¹ *ibid.* pp 248

of the mandatory death penalty, British society saw the MMS of death as being excessively harsh, especially on property crimes. Spurred on by the Enlightenment ideal of proportionality of punishment, the US *1790 Crime Act* removed capital punishment from many offences.¹⁴²

It was not until 1951 that the US Congress expanded the scope of MMS in a big way by implementing their use for drug offenses. Prior to this expansion, “mandatory minimum penalties typically punished offenses concerning treason, murder, piracy, rape, slave trafficking, internal revenue collection, and counterfeiting.”¹⁴³ This changed with the passage of the *Boggs Act (1951)*, which amended the *Narcotic Drugs Import and Export Act of 1922*, enacting MMS of at least two years for narcotics possession.¹⁴⁴ ¹⁴⁵ By the late 1960s it was clear to lawmakers that increased sentence length had not reduced drug law violations as intended, and in fact MMS for drug offences had been a failure.¹⁴⁶ Congress later passed the *Comprehensive Drug Abuse Prevention and Control Act of 1970* that repealed virtually all mandatory penalties for drug violations.¹⁴⁷ ¹⁴⁸ ¹⁴⁹ In 1973, swinging away from MMS, Oregon was the first state to decriminalise cannabis (marijuana) possession. By 1977, a short four years later, ten other states

¹⁴² United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Washington: *Congressional Testimony*, October 2011): 8.

¹⁴³ *Ibid.* Pp 22.

¹⁴⁴ Molly M. Gill, “Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums”, *Federal Sentencing Reporter*, 21, No. 1 (October 2008): 55.

¹⁴⁵ United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Washington: *Congressional Testimony*, October 2011): 8.

“This trend was continued with the passage of *Narcotic Control Act of 1956*. Lawmakers not only lengthened MMS for drug offences they also prohibited parole for those convicted. Certain enhancements for certain aggravating factors were also introduced, such as trafficking narcotics to a minor. This specific aggravating factor proscribed a minimum penalty of ten years imprisonment, and a maximum of death.”

¹⁴⁶ *Ibid.* Pp 22.

¹⁴⁷ *Ibid.* Pp 8.

¹⁴⁸ *Ibid.* Pp 23.

“Congress believed that changes in the existing penalties, particularly through elimination of mandatory minimum sentences, would establish a more realistic, more flexible, and thus more effective system of punishment and deterrence of violations of the federal narcotics laws.”

¹⁴⁹ David Bjerk, “Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing”, *Journal of Law and Economics* 48, no 2 (October 2005): pp 594.

“In fact one of the main reasons Congress repealed almost all of the existing mandatory minimum sentences for drug offenses in 1970 was because there was a feeling that the severity of existing penalties, involving in many instances minimum mandatory sentences, [has] led in many instances to reluctance on the part of the prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offenses.”

in the US had decriminalised cannabis.¹⁵⁰ Presidential candidate Jimmy Carter proclaimed his support for such state initiatives going so far as to say that he supported a change in federal criminal law that would allow the possession of up to one ounce of cannabis.¹⁵¹

US lawmakers swung back in the 1980s in response to a national crack ‘epidemic.’¹⁵² The crisis began when two celebrity athletes died in what were described as crack-related deaths. US politicians responded with two major pieces of legislation: *The Sentencing Reform Act of 1984* and *The Anti-Drug Abuse Act of 1986*.¹⁵³ These two acts have formed the legislative framework for federal drug offenses for the past thirty years. *The Sentencing Reform Act (1984)* created the United States Sentencing Commission. The commission was tasked with establishing a set of statutory sentencing guidelines that were intended to bring virtually unlimited judicial discretion into check. These guidelines contained a set of minimum and maximum penalties for drug offenses, especially those involving weapons or repeat felony offenses. From their inception, these guidelines were intended to be mandatory and absolute. In 2005, however, the Supreme Court of the United States (SCOTUS) ruled that making them mandatory was unconstitutional.

This research paper will briefly exhibit two major cases that led to the federal sentencing guidelines to be declared unconstitutional. The first case is *Blakely v. Washington*, and the second is *US. V. Booker*. These two cases applied the SCOTUS ruling in *Apprendi v New Jersey* to a set of Washington State sentencing guidelines and to the Federal Sentencing Guidelines,

¹⁵⁰ Grass: History of Marijuana. DVD. Directed by Ron Mann. Toronto: Unapix Home Entertainment, 1999.

¹⁵¹ *ibid.*

¹⁵² Craig Reinerman and Harry G. Levine, *Crack in America* (University of California Press, 1997), 48.

“In the spring of 1986 the media seemed to sense a potential bonanza. Coverage skyrocketed and crack became widely known. Dramatic footage of black and Latino men being carted off in chains or of police breaking down crack house doors, became a near nightly news event.”

¹⁵³ United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Washington: *Congressional Testimony*, October 2011): 9.

“In 1984, after nearly a decade of bipartisan effort, Congress enacted the *Sentencing Reform Act of 1984*. This law established the United States Sentencing Commission and directed it to develop an unprecedented body of laws to regulate federal sentencing: the federal guidelines.”

respectively.¹⁵⁴ *Blakely* pled guilty to the kidnapping of his “estranged wife and the facts admitted in his plea supported a maximum sentence of 53 months,” according to a set of sentencing guidelines enacted in Washington State.¹⁵⁵ These sentencing guidelines allowed for the judge to impose a sentence that exceeded the statutory maximum in exceptional circumstances. Based on his ‘exceptional cruelty,’ the trial judge effectively doubled *Blakely*’s sentence, despite the fact that the details of this cruelty were not included in his plea or brought before the jury.¹⁵⁶ The Supreme Court of the United States ruled, in a 5-4 decision, that this sentence violated *Blakely*’s sixth amendment rights to a trial by jury.¹⁵⁷ One year later, in *US. V. Booker* the SCOTUS ruled that the federal sentencing guidelines were also unconstitutional.¹⁵⁸ With the ruling in *Booker*, it would not be enough for the courts to secure a conviction for possession, for example, unless the specific amount of drugs was reflected in the indictment and proven beyond a reasonable doubt. The justices ruled that the section of the *Sentencing Reform Act (1984)* that made the Federal Sentencing Guidelines mandatory conflicted with their statutory interpretation of the Sixth Amendment.¹⁵⁹

The basic framework of mandatory minimum penalties currently applicable to federal drug offenses has its roots in the second piece of major drug legislation passed in the 1980s: *The*

¹⁵⁴ “*Apprendi v. New Jersey*,” Justia.com US Supreme Court Center (US Supreme Court, Decided June 26, 2000). “The Fifth Amendment’s Due Process Clause and the Sixth Amendment’s notice and jury trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. The Fourteenth Amendment commands the same answer when a state statute is involved.”

¹⁵⁵ “*BLAKELY v. WASHINGTON*,” The Oyez Project at IIT Chicago-Kent College of Law (US Supreme Court, Decided June 24, 2004).

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

“This case requires the Court apply the Rule of [*Apprendi v New Jersey*] that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

¹⁵⁸ “*United States v. Booker*” Cornell University Law School (US Supreme Court, Decided January 12, 2005).

“[*Blakely*] made clear that the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. Were the guidelines merely advisory-recommending, but not requiring, the selection of particular sentences in response to differing sets of facts-their use would not implicate the Sixth Amendment.” (original emphasis)

¹⁵⁹ *ibid.*

Anti-Drug Abuse Act of 1986. This act, like the *Sentencing Reform Act (1984)* before it, was passed under a ‘drug crisis.’¹⁶⁰ Due to a sense of national urgency surrounding drugs, and specifically crack cocaine, the US Congress “bypassed much of its usual deliberative legislative process, holding no committee hearings and producing no reports based on the act.”¹⁶¹ The *Anti-Drug Abuse Act (1986)* created a system of “non-parolable, mandatory minimum sentences for drug trafficking offenses that ties the minimum penalty to the amount of drug involved in the offence.”¹⁶² There are similarities in that regard to the *Boggs Act (1951)* that was introduced thirty years prior.

The Anti-Drug Abuse Act (1986), however, has several inherent flaws. The first is that it relies on weights of drugs to activate the MMS provision. This can create enormous disparities in sentences between very similar offenders. This phenomenon, termed the ‘cliff effect,’ is the disproportionate sentence applied to offenders who are either just inside, or outside, the scope of the MMS. For example, there could be “a four year difference in [mandatory minimum] penalties between defendants whose cases may differ by only .01 grams of crack.”¹⁶³ Another issue with using weights as a measure is the enormous disparity between the activation weight of MMS for powdered cocaine and crack cocaine. The original act contained a 100:1 ratio between the activation weights of crack and powdered cocaine. This meant that a MMS of five years would apply equally to a person convicted of possessing 500 grams of powdered cocaine as a person

¹⁶⁰ United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Washington: *Congressional Testimony*, October 2011): 23.

“Congress expedited passage of the 1986 act in response to a number of circumstances, including the increased incidence of drug use and trafficking and well-publicised tragic incidents such as the June 1986 death of Boston Celtics’ first-round draft pick, Len Bias.”

¹⁶¹ *ibid.* Pp 24.

¹⁶² *ibid.* Pp 10.

“This act sought to cover mid-level players in the drug distribution chain by providing a mandatory minimum penalty of five years. The act triggered the five-year mandatory minimum by weights such as 100 grams or more of mixture or substance containing heroin, and 500 grams or more of a mixture or substance containing cocaine. A second conviction for these offenses carried a ten-year minimum sentence.”

¹⁶³ *ibid.* Pp 25.

possessing merely 5 grams of crack.¹⁶⁴ Despite the fact that one can turn powdered cocaine into crack at essentially a 1:1 ratio, the US Congress perceived crack to be a larger threat to the nation. It is interesting to note that powdered cocaine was, and to an extent still is, seen as a middle class drug, while crack was perceived to be the drug of choice for those of lower social classes, and especially for visible minorities.¹⁶⁵ This radically different treatment of essentially the same drug has had a disproportionate impact on African-American defendants in the United States. As the US Sentencing Commission concluded, the disproportionate impact of mandatory minimum penalties on black drug offenders is largely driven by crack cocaine offenses.¹⁶⁶ Despite similar usage rates to whites, “over 88% of those arrested for possession of crack are African American.”¹⁶⁷ Additionally, while 76% of drug users are white, African-Americans comprise 74% of all mandatory minimum drug sentences.¹⁶⁸

The United States Sentencing Commission identified at least 171 individual mandatory minimum sentences in federal criminal statutes.¹⁶⁹ Despite this fact, 94% of federal cases that include MMS fall under just four different statutes: manufacture and distribution of controlled substances, possession of controlled substances, penalties for the importation and exportation of controlled substances, and sentence enhancements for carrying a firearm during a drug or violent crime.¹⁷⁰ Drug crimes consume a very large amount of judicial time and expenditures. In 2000,

¹⁶⁴ *ibid.* pp 25

¹⁶⁵ Christopher Mascharka, “Mandatory Minimum Sentences: Exemplifying the law of Unintended Consequences”, *Florida State Law Review* 28 (1998), 944.

¹⁶⁶ United States Sentencing Commission, Overview of Statutory Mandatory Minimum Sentences, (Washington: *Congressional Testimony*, October 2009), 10.

¹⁶⁷ Christopher Mascharka, “Mandatory Minimum Sentences: Exemplifying the law of Unintended Consequences”, *Florida State Law Review* 28 (1998), 944.

¹⁶⁸ *ibid.* Pp 944.

¹⁶⁹ United States Sentencing Commission, Overview of Statutory Mandatory Minimum Sentences, (Washington: *Congressional Testimony*, October 2009), 16.

¹⁷⁰ United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Washington: *Congressional Testimony*, October 2011): 11.

57% of all federal inmates were serving a sentence for a drug offence.¹⁷¹ In 2008, the United States Sentencing Commission also found that drug offences accounted for 35.8% of the overall federal case load. Looking only at offences that involve MMS, drug offenders represented a whopping 82.5% of the federal case load.¹⁷² Between the years of 1981 and 1995, the US federal drug control budget increased from \$1.5 billion to \$13.2 billion—an eight fold increase.¹⁷³ That number now rests at \$26.2 billion dollars for fiscal year 2012.¹⁷⁴ Drug use rates and drug availability remain high while prices continue to fall.

It is abundantly clear that the impact of MMS for nonviolent drug offenders simply does not justify the huge government expenditures and social costs.¹⁷⁵ The proliferation of MMS for drug crimes have not “demonstrably reduced drug trafficking or affected its most common measure, the street prices of illicit substances.”¹⁷⁶ In fact, one could deduce that MMS for drug offenses have actually had the inverse effect of their goal because purity and availability of drugs have risen while street price has fallen. It has taken more than thirty years for the US federal government to even begin to address some of the major shortcomings of the *Anti-Drug Abuse Act (1986)*. The US Congress passed the *Fair Sentencing Act of 2010* to much fanfare.¹⁷⁷ This act was seen as helping to address the disproportionate sentences that, mostly young, African-American men faced for crack.¹⁷⁸ The *Fair Sentencing Act (2010)* reduced the 100:1 disparity

¹⁷¹Molly M. Gill "Correcting Course: Lessons from the 1970 repeal of Mandatory Minimums." University of California Press 21, no. 1 (2008): 60.

¹⁷²United States Sentencing Commission, Overview of Statutory Mandatory Minimum Sentences, (Washington: *Congressional Testimony*, October 2009): 10.

¹⁷³Office of National Drug Control Policy, *Drugs and Crime Facts, 1994* (Washington: June 1995): 10.

¹⁷⁴Executive Office of the President, *National Drug Control Budget – FY 2012 Funding Highlights*, (Washington: January 2012).

¹⁷⁵Christopher Mascharka, “Mandatory Minimum Sentences: Exemplifying the law of Unintended Consequences”, *Florida State Law Review* 28 (1998), 945.

¹⁷⁶Michael Tonry, “Mandatory Penalties,” *Crime and Justice* 16, (1992): 244.

¹⁷⁷*Fair Sentencing Act of 2010, US Code 3797-u* (2010), S. 1789.

This law was signed into law by President Obama on August 3, 2010. The original disparity was 100:1 The *Fair Sentencing Act (2010)* changed this disparity to 18:1. The changes were not made retroactive.

¹⁷⁸The Washington Post, *The Fair Sentencing Act corrects a long-time wrong in cocaine cases* (Washington: The Washington Post, August 3, 2010).

between activation weights of powdered cocaine and crack to 18:1.¹⁷⁹ Unfortunately, the *Fair Sentencing Act* was not made retroactive to the many, largely African-American, US convicts serving sentences for crack offenses.

The Government of Canada, as we will see, is embarking on a similar path by rushing the *Safe Streets and Communities Act* into law.¹⁸⁰ The Canadian Parliament, much like the US government in its passing of the *Anti Drug Abuse Act (1986)*, is not producing sufficient reports and is foregoing the many committee hearings that most Canadian bills go through before becoming law. This Canadian act contains nine previous tough-on-crime acts that the Conservative Party had failed to pass while governing under consecutive minority governments. Curiously, the Cabinet of the Government of Canada was found in contempt of parliament for not supplying sufficient documentation for some of their previous crime legislation.¹⁸¹ Much like US legislators in the 1980s, the Government of Canada is attempting to rush through anti-crime legislation at a time of perceived public excitement. Also similar to US drug law from the 1980s is the desire to impose mandatory minimum sentences for drug offenders. Many critics of the proposed legislation point to the failure the US federal government and several state governments have had when it comes to MMS for drug offences.¹⁸² The legislative summary for Bill S-10, one of the pieces of legislation now being revived for the *Safe Streets and Communities Act (2011)*, not only provides a history of the failures of US drug policy, it also

¹⁷⁹ American Civil Liberties Union, *Fair Sentencing Act*, (New York: ACLU, 2011).

¹⁸⁰ Department of Justice Canada, Government of Canada Introduces the Safe Streets and Communities Act, (Ottawa: Department of Justice, 2011).

¹⁸¹ CBC news, *MPs' report finds government in contempt* (Ottawa: CBC News, March 21, 2011).

¹⁸² The Government of Canada, *Legislative Summary of Bill S-10: An Act to amend the Controlled Drugs and Substances Act and to make related and consequential amendments to other Acts* (Ottawa: Legal and Legislative Affairs Division, 2011).

“The measures would strip judges of the ability to apply discretion for mitigating circumstances and could turn Canadian correctional institutions and penitentiaries into US-style inmate warehouses. Some opponents of the mandatory sentencing that is a feature of the drug bills have noted that the increase in costs to operate prisons will draw funds away from social programs, like those addressing improved education, health care and child poverty, which reduce crime. Incarceration is seen as poor stewardship of both money and human resources. Other opponents of mandatory minimum sentencing have taken note of the fact that the United States, which has championed the use of such sentences for many years, is, in some cases, moving away from them.”

points to Canadian experiences and social studies that show MMS as being an ineffective social policy tool. It is unlikely that Canada's foray into MMS for drug offenses will 'buck the trend,' considering the wealth of evidence demonstrating the ineffectiveness of similar legislation in the US and the fact that the champion of MMS, the US, is now moving away from them.¹⁸³ Assuming the Act passes into law, the Government will, in all likelihood, eventually 'swing' and repeal it.¹⁸⁴ Unfortunately, this will only occur after MMS drug penalties have exacted a large economic, social and human cost.

It is obvious that the only reason MMS drug laws are implemented in the first place is for the short term political gains of politicians. When debating MMS, officials are primarily concerned with being seen as 'tough on crime.' They are not seeking to craft sound judicial policy but instead are focused on rhetorical and symbolic goals.¹⁸⁵ There is no question that illicit substances cause serious societal ills. Drug addiction destroys families, and drug trafficking disputes kill thousands. The ravages of substance abuse and related violence in Canada, especially amongst Aboriginal Canadians, is an open secret. The drug war in northern Mexico between rival drug gangs has claimed the lives of over 50,000 people.¹⁸⁶ Governments need to act in order to help prevent gang related violence, but also to protect the vulnerable—including drug addicts themselves. When crafting drug policy, legislators need to look at the history of mandatory incarceration. Serious academic research is clear; the results of MMS for nonviolent drug offenders do not justify the huge economic expenditures and social costs.¹⁸⁷ ¹⁸⁸ They simply do not work. Perhaps it is time that politicians take a critical look at the use of punitive tools to

¹⁸³ *ibid.*

¹⁸⁴ *Post Scriptum: The Safe Streets and Communities Act (2011)* received Royal Assent March 13, 2012. Many provinces are now on the hook for dramatically increased spending on police, courts and incarceration. This is all despite a year over year decline of the Canadian crime rate.

¹⁸⁵ Michael Tonry, "Mandatory Penalties," *Crime and Justice* 16, (1992): 244.

¹⁸⁶ Cross, Allison and Ian Vandaele. "Canadians flock to Mexico despite ongoing drug war," *The National Post*, January 24, 2012).

¹⁸⁷ Christopher Mascharka, "Mandatory Minimum Sentences: Exemplifying the law of Unintended Consequences", *Florida State Law Review* 28 (1998), 945

¹⁸⁸ Michael Tonry, "Mandatory Penalties," *Crime and Justice* 16, (1992): 24

ameliorate the impact of drug crimes. Politicians whose ends are to reduce drug use in their constituencies are irresponsible in their support of MMS. In every jurisdiction that has ‘softened’ drug laws, through decriminalisation or a reduction in punitive sentences, drug use has declined. The Netherlands, for example, tolerates the open use and sale of cannabis. Despite, arguably, being soft on crime it has a per capita cannabis use rate that is half that of the US. If the repeal of alcohol prohibition is any indication, it is likely that governments will one day take a realistic approach to drug crime and decriminalise, or even legalise, certain drugs.¹⁸⁹

¹⁸⁹ During the presidential elections of the US held on November 6, 2012 two states, Washington and Colorado, legalised through ballot initiatives the production, possession and sale of cannabis (marijuana). In Colorado more votes were cast in support of cannabis law reform than either presidential candidate. Obviously this new direction conflicts with existing federal drug laws in the US. In a Canadian context it could perhaps prove more difficult to justify a tough new direction on drugs, and especially cannabis, when a state that borders Canada has clearly moved in the opposite direction. How the US federal government intends to respond to this change, and with it the medical cannabis already permitted in several states, remains to be seen. There is a chance that the winds of change will continue to blow, and this new policy direction marks a departure instead of an aberration.

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CANADIAN POLITICS

The Fight to Regain Indigenous Self-Determination in Canada

By Philip Henderson

Few ideas in political theory have the same potency and impact as that of self-determination. The belief that individuals and groups have the right to determine their own course of action has been a characterizing feature of liberation movements throughout modernity. However, the extent to which this right extends has never been fully determined. Which identities should be recognized as self-governing are often closely related to which are able to exercise power most effectively—a fact that has left the indigenous people of Canada powerless relative to the Canadian state, which governs their affairs almost unilaterally. This reality does nothing to address the imperative question of whether indigenous peoples ought to have the authority to govern themselves. It is the inherent moral right of Canadian indigenous peoples to govern their own fate. However, the Canadian state believes itself to be invested with the supreme authority to govern over indigenous people. Examination of the long history of colonialism and dispossession of indigenous people, at the hands of the Canadian state, will dispel any claims to moral authority. Following this, it will be important to highlight the cultural divide that separates indigenous people from mainstream Canadian society. An illustrative listing of Canada's domestic and international obligations to indigenous people will help to provide a legal framework through which to justify self-government. Finally, a dismantling of the liberal-democratic project will reveal that it does little to serve the interests of indigenous Canadians. While it is important to present alternatives to the current system, this endeavour is beyond the scope of such a brief paper. Rather, it will suffice to dismantle any assumptions about the right of the Canadian state to govern indigenous populations.

For most Canadians, the history of their country is a point of pride. They view themselves as peacekeepers, a middle-power and a benign force in the world. The indigenous

people of Canada, however, have an entirely different view of the Canadian experience. To them, the history of Canada is a legacy of colonization and dispossession or ‘naked theft’ of their land, leading to their current economic dependency.¹ Prior to contact with European settlers, indigenous people freely governed their own affairs, without fear of interference by great powers. The expansion of European society to North America represented the beginning of a slow decline of autonomous indigenous communities. Forced to abandon their traditional way of life, the first people of Canada were relocated onto small reserves so that Europeans could better manage the wealth of their newfound colonies. These reserves served to deliberately alienate indigenous people from their “traditional economic practices.”² The ancient practice of subsistence living, which indigenous people had followed for generations, was replaced with absorption into the wage-based labour economy—a situation which continues to this day.

Despite the great wealth produced in Canada, indigenous people living on reserves are forced to suffer conditions that can be found nowhere else in the country. The living conditions on these reserves are comparable to those in the Third World.³ This indignation severs indigenous people from their rich history. It also serves to legitimate the authority of the colonial state over a formerly independent people. As indigenous populations become more dependent upon the labour economy for their livelihoods, they are absorbed into the culture that has conquered them. They undergo a cultural transformation that changes them from autonomous communities to people entirely dependent upon colonial society for survival. The end result of this transformation often leads indigenous people to view themselves as willing subjects rather than people forcibly conquered.⁴

¹ Todd Gordon, *Imperialist Canada* (Winnipeg: Arbeiter Ring Publishing, 2010), 69.

² *Ibid.*, 72.

³ Dan Russell, *A People’s Dream: Aboriginal Self-Government in Canada* (Vancouver: UBC Press, 2000), 8.

⁴ Glen S. Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada,” *Contemporary Political Theory* 6 (2007): 443, <http://www.jstor.org/> (accessed December 2, 2011).

In effect, every effort has been made on the part of the Canadian state to erase the legacy of independent Canadian indigenous people. As Coulthard argues, efforts to ‘recognize’ indigenous cultures within Canada are often mere token-gestures by the colonial power. Recognition has been characterized as the “hegemonic expression” of indigenous efforts to achieve self-government, most often through achieving legal equality within the state.⁵ Unfortunately, the policy of recognition will serve to effectively legitimate and “reproduce... configurations of colonial power,” granting at best marginal benefits to indigenous people.⁶ This result will leave the indigenous population mired in the self-perpetuating cycle of colonial dependency, as previously described. This protracted alienation can never be tolerable to a people who had enjoyed autonomy for so long before European contact. As such, it ought to be resisted insofar as is possible. To these ends it is necessary for those indigenous people concerned with preserving their autonomy and their history to divorce themselves from the Canadian state that has no moral authority by which to govern their affairs.

Furthering the alienation of indigenous people in Canada is the diametric opposition of their ancestral culture to the dominant paradigm of mainstream society. While the majority of Canadians may feel comfortable within the state structures of modern Canadian society, this hierarchical and domineering system bears little resemblance to traditional indigenous social structures. As previously discussed, the dominant Canadian response to protests for greater indigenous autonomy has been through a process of recognition of equality before the law. This approach is definitive of the liberal-democratic state, which seeks to legitimize its authority through broad-based appeal. These efforts, however well-intentioned, serve only to uphold the prevailing social order. As the Supreme Court of Canada is bound by precedent it is, by its nature, incapable of deviating drastically from its legal origins. Those origins are, according to

⁵ Ibid., 438.

⁶ Ibid., 439.

Coulthard, “white supremacist” in their nature, as they presuppose that the Canadian government has authority over indigenous people.⁷ With this system as the framework for legal action, it is only natural that indigenous Canadians have such minimal control over their affairs. The evidence of continued colonialism is readily apparent. UNESCO, the United Nations body charged with preserving unique cultures globally, does not engage directly with indigenous people, instead it must work with only UN member states.⁸ In Canada, it is the federal government that decides which aspects of indigenous culture are worth preserving and sharing with the world. They often choose to use the image of a “noble yet doomed” people.⁹ These conditions are completely unnecessary. That a self identifying group, with a unique history and culture, is having their heritage defined by the very institution that robbed them of their original independence is morally abhorrent. This arrangement gives enormous power to the Canadian state to legitimize or quash whatever aspects of the indigenous culture they deem appropriate.

Even if a truthful representation of indigenous culture were being given by the Canadian state, many have argued that traditional ways of life are simply incompatible with the modern state. The struggle over the “heart and soul” of indigenous communities is being waged by an ideology that seeks to exploit people and the earth for profit, both of which indigenous communities seek to preserve.¹⁰ The “destructive and homogenizing force” of liberal-democracy and capitalism supported by the Canadian state represents a grave threat to indigenous culture.¹¹ Power, for indigenous people, is not the coercive threat of one over another individual or group. For the First People, power comes instead from a respect for “nature and the natural order.”¹² Cultures in such dramatic conflict will inevitably clash when one must struggle to exist within

⁷ Ibid., 451.

⁸ Jessica Shadian, “From states to polities: Reconceptualizing sovereignty through Inuit governance,” *European Journal of International Relations* 16, no.3 (May 2010): 486, <http://jstor.org/> (accessed December 1, 2011).

⁹ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills: Oxford University Press, 2009), 83.

¹⁰ Ibid., 84.

¹¹ Ibid.

¹² Ibid.

the other. Neither one, however, has an absolute claim to truth. While the ideology represented by the Canadian state is widely accepted and firmly established across the country, traditional indigenous beliefs have a long history in Canada and served their communities well before European contact.

Furthermore, as Carrithers observes, cultures are “overlapping, interactive and internally negotiated”; with this in mind, hierarchical authority of one culture over another is antithetical to cultural preservation.¹³ For cultural development to continue, there ought to be as little interference from external institutions as possible. This will allow for uninterrupted interaction and internal negotiation. As such, both belief systems ought to be permitted to exist—parallel to one another—affording both cultures the respect they deserve. The absolutist policy of the current system, whereby the culture of indigenous Canadians is trivialized, cannot be allowed to continue. Separation from the authority of the Canadian state would enable indigenous people to repair the damage done to their culture and begin rethinking their role in the global society.

It should now be recognized that there exist several very important legal concerns regarding the issue of indigenous self-determination. This legal framework emphasizes the obligation for the state to transfer greater authority to indigenous communities, as it highlights huge inconsistencies in the Canadian government’s approach to indigenous rights. First and foremost, it must be noted that the European nations, and later the Canadian state, fought no war to conquer the indigenous people. Neither did the indigenous people willingly divest themselves of their preexisting sovereignty.¹⁴ Their surrender to the Canadian state was induced through terrorism, executions and “gunboat diplomacy.”¹⁵ Thus, indigenous Canadians have no sense of

¹³ Michael Carrithers, *Why humans have cultures: explaining anthropology and social history* (Oxford: Oxford University Press, 1992), quoted in James Tully, *Strange multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995), 10.

¹⁴ Jay T. Johnson, “Indigeneity’s Challenges to the White Settler-State: Creating a Thirdspace for Dynamic Citizenship,” *Alternatives* 33, no. 1 (January-March 2008): 32, <http://jstor.org/> (accessed December 2, 2011).

¹⁵ Gordon, 77.

ever ceding power to a European authority.¹⁶ This fact is of crucial importance when determining the authority of the Canadian state in indigenous affairs. Without some original act that clearly nullifies the sovereignty of indigenous people, the Canadian claim to sovereignty over them lacks validity.

Leaving aside the shaky foundation underlying the Canadian state's management of indigenous affairs, it is also important to examine the legislation that has been enacted. The principle legal document for Canadian-indigenous relations is the *Indian Act*. Enacted to codify the relationship between the colonizing Canadian state and the conquered indigenous communities, this legislation is still in use today. This act gave to the state "total political authority" over the affairs of indigenous people, while simultaneously denying them legal status equal to that of other Canadians.¹⁷ Under this legislation, indigenous Canadians were not able to vote in elections without giving up their legal indigenous status.¹⁸ In effect, the message was that a person had to be either Canadian or indigenous; there was no middle ground. More than simply excluding indigenous people from Canadian society, the *Indian Act* also took upon itself the power to define who was or was not a "status Indian."¹⁹ Under the logic of the *Indian Act* indigenous people are deemed incapable of managing their own affairs. Even worse, the *Act* takes from them the right to identify as a member in their own community. While this law remains on the books to this day, the Canadian state has passed subsequent legislation that makes overtures towards self-determination rights. In a 1995 policy document, the government of Canada acknowledged the "inherent right of self-government" over internal affairs that existed for indigenous Canadians under the *Constitution Act* (1982).²⁰ While this statement does not

¹⁶ Russell, 11.

¹⁷ Gordon, 75.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Russell, 9.

carry the same legal weight as the *Indian Act*, it is nevertheless an important act of recognition on the part of the federal government.

Oddly enough, however, the government seems unwilling to take concrete action in regards to these grandiose statements despite the fact that there have been many opportunities to do so. In 1996, the year after that same government policy statement was released, Denmark ratified the International Labour Organization (ILO) *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (CCITPIC).²¹ Under this convention the ownership rights of indigenous people over the territory that they “traditionally occupy” are explicitly stated.²² Canada has never signed this convention, despite the government’s stated pretenses of self-determination only months earlier. This is an exemplary case of a government failing to live up to the ideals that it espouses. It is, however, less embarrassing than the obstructionist approach that has been employed by the Canadian government in recent years.

In 2007, the world came together to draft the United Nations *Declaration on the Rights of Indigenous Peoples* (DRIP). This declaration underwent a ten-year review process and was intended to act in parallel to state laws regarding the rights of indigenous people.²³ It is significant not necessarily because of its status as international law, which is often ignored or violated, but because it makes such a bold symbolic statement. The *Declaration* sought to firmly establish that indigenous people around the world must be recognized as having significantly different rights, in light of their status as colonized people. For the Canadian government, however, this is an unacceptable position. As 144 states voted in favour of the *Declaration* Canada was amongst only four that opposed.²⁴ There is no way that the Canadian government

²¹ Leslie Sturgeon, “Constructive Sovereignty for Indigenous Peoples,” *Chicago Journal of International Law* 6, no. 1 (Summer 2005): 457, <http://jstor.org/> (accessed December 1, 2011).

²² *Ibid.*

²³ Siegfried Wiessner, “Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous People,” *Vanderbilt Journal of Transnational Law* 41 (2008): 1159, <http://jstor.org/> (accessed December 1, 2011).

²⁴ *Ibid.*, 1162.

can carry any sort of credibility on the international stage following this debacle. Canada is now an outlier on indigenous issues—a global pariah. What is most important for indigenous Canadians to glean from this incident is that the Canadian state is willing to isolate itself from the international community in order to avoid making strong commitments. While the entire world is deciding to move forward, Canada has chosen to remain trapped in its colonial relationships.

While very few people are entirely opposed to the notion of self-determination, many liberal scholars have sought to dramatically restrain the scope of its meaning. For academic Paul Keal, it is fundamentally important that the establishment of a state remain the unalterable basis of self-determination and sovereignty.²⁵ He goes on to state that the current claims of indigenous Canadians are not, at present, a threat to the “political legitimacy” of the Canadian state or the power which it exercises over indigenous people.²⁶ What would then seem to be of fundamental importance, is the maintenance of this legitimacy. Keal argues that, to these ends, it is important to “recognize Indigenous rights and concerns,” as this will ensure the stability of the state.²⁷ These arguments are wonderfully convincing as classic liberal assertions. They would help to both better enfranchise indigenous Canadians into society at large and strengthen the social cohesion of Canada, all the while improving the conditions of indigenous people.

Keal’s designs, however, fail to address several underlying issues that continue to plague Canadian-indigenous relations. Most importantly, it should be recognized that the arguments which Keal advances are made not out of concern for indigenous people, but for the Canadian state. He has reversed the victimhood of this relationship and does not discuss the need to maintain the legitimacy of indigenous communities. Instead, he shows concern for the firmly

²⁵ Paul Keal, “Indigenous Self-Determination and the Legitimacy of Sovereign States,” *International Politics* 44 (2007): 287, <http://jstor.org/> (accessed December 1, 2011).

²⁶ *Ibid.*, 288.

²⁷ *Ibid.*

established institution of the Canadian state—an odd concern considering how unlikely it is that any action taken by indigenous people will represent a substantial threat to the state’s viability. In reality, the worry should be directed the other way because the “homogenizing” power of the Canadian state does represent a very real threat to the traditional indigenous lifestyle.²⁸

Even more insidious, however, is Keal’s idea that the Canadian government has any political legitimacy in indigenous affairs at all. As discussed above, the Canadian state has absolutely no moral authority by which to govern indigenous people. With this in mind, why would indigenous people not fight to expose the illegitimacy of the state? Keal’s hope is that deeper enfranchisement into Canadian society will act as a form of pressure release, preventing indigenous frustrations from boiling over into something more palpable. His worst fears seem to be that indigenous frustrations might mutate into a “categorical conception” that self-determination ought to mean sovereignty.²⁹ While this situation might be in the best interests of indigenous Canadians, it would certainly not be desirable for the Canadian state, as it would undermine their claim to the totality of Canadian territory. Keal should recognize that what he is proposing only serves to more deeply entrench the *status quo* and to perpetuate the vast inequalities that now characterize Canadian-indigenous relations.

Undoubtedly, the history of Canadian-indigenous relations has been one full of many great shocks and tragedies. It has left a legacy of dispossession, alienation, and subjugation with which the survivors must now grapple. As they attempt to rebuild their people and culture, indigenous Canadians continue to face humiliation from the raw power and authority of the Canadian state. Rather than recognizing its crimes and withdrawing from its position of meddling in indigenous affairs, the Canadian government continues to involve itself in a culture that it does not and cannot understand. Even worse than that, the state continues to pay only lip-

²⁸ Alfred, 84.

²⁹ Keal, 288.

service to issues raised by the indigenous. It has carried out a policy of systematically obstructing any kind of meaningful advancement in areas of indigenous self-determination that may not coalesce with the state's desire to maintain undivided sovereignty. Furthermore, the liberal project of enfranchisement has proven to be little more than token gesture, designed to quell discontent and entrench state power. Keeping in mind these facts, the moral authority of the Canadian state to govern the affairs of indigenous people is void. Self-determination is the only morally acceptable path for indigenous communities to take. It must, however, be a bold, new vision of self-determination, one that is not modeled on the failures of the Canadian state, but on the cultures that characterize each community. The values and beliefs of indigenous Canadians have sustained them through centuries of colonialism, and will do so going forward if they are ready to shake off the yolk of the Canadian state and become free people again.

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AMERICAN POLITICS

American Constitutionalism and International Human Rights: A Legal Perspective
Issues of Treaty Ratification, Rights Obligations and U.S. Judicial Precedents

By Jeremy Luedi

In the first decade of the 21st century, the issue of human rights has become engrained in the popular conscience of the world and infused in the lexicon of politicians, journalists and activists. Following the events in Rwanda, the former Yugoslavia and Sudan, the issue of human rights has become a collective concern. In the spirit of protecting the rights and privileges of humanity as well as seeking to redress and punish violations of human dignity, an international body of law grounded on treaties has emerged. During the last few decades, the world has witnessed an ever-increasing number of international human rights conventions and multilateral institutions. Nations of the world have ratified these treaties in order to demonstrate their commitment to both local reform as well as the creation of new international norms and codes of conduct. One nation—the United States of America—remains an outlier. Despite its rhetoric of defending liberty, equality and freedom, the U.S. has failed to ratify or sign many of the most important international human rights treaties. Such actions have left many nations angry and confused, for the refusal of the global hegemon to partake in global initiatives undermines collective efforts and encourages other states to disregard emerging human rights norms. This paper argues that the actions of the U.S. are neither random nor contemptuous of the global community; rather, American objections and abstentions from treaties are due to the role of domestic U.S. legal tradition and the role of the Constitution. This essay shall highlight the role of the Constitution in shaping American responses to international human rights treaties and issues, as well as the evidence, both domestic and treaty-based, for greater American human rights reform and progress.

Human rights, due in part to their appeal to a sense of common morality, exist in an atmosphere of international customs and other normative standards. Specifically, human rights

form part of customary international law: a set of behavioral and procedural norms followed by most states out of a sense of decorum.³⁰ Executing customary international law occurs via voluntary compliance rather than written legislation.³¹ This emphasis in turn has traditionally made human rights difficult to enforce, for most human rights treaties are articulated in non-self-executing terms, often rendering them impotent against non-compliance.³² Non-self-executing treaties, unlike self-executing covenants, do not immediately become law upon ratification, rather they require the implementation of legislation by signatory countries.³³ The onus in turn falls on signatory states to carry out and abide by the articles of various human rights treaties. The non-self-executing nature of treaties in turn allows for a considerable degree of latitude with regards to policy implementation. Consequently, countries such as the United States are often able to tailor their reactions to treaty requirements.

International customary law is defined by the collective actions of states, and as such the development of new customary law can be circumvented by the persistent objector doctrine.³⁴ This doctrine allows for states that persistently object to the development of new law to be exempt from said law when it matures. This doctrine is seen as integral by traditionalist theorists who stress the importance of interstate consent and sovereignty.³⁵ The United States often employs the objector doctrine as a tool to voice its concerns or reservations regarding specific international treaties. Reservations, understandings and declarations (RUDs) allow states to exempt themselves from certain clauses, to elaborate on their positions, or merely to attach

30 Brenton T. Culpepper, "Missed Opportunity: Congress's Attempted Response to the World's Demand for the Violence against Women Act," *Vanderbilt Journal of Transnational Law* 43, no. 3 (2010): 740.

31 Rhona K. M. Smith, "Human Rights in International Law," in *Human Rights: Politics and Practice*, ed. Michael Goodhart (Oxford: Oxford University Press, 2009), 27.

32 Culpepper, 742.

33 Nick Petree, "Born in the USA: An all-American view on Birthright Citizenship and International Human Rights," *Houston Journal of International Law* 34, no.1 (2011): 182.

34 Holning Lau, "Rethinking the Persistent Objector Doctrine in International Human Rights Law," *Chicago Journal of International Law* 6, no. 1 (2005): 496.

35 *Ibid.*

statements to their signatures.³⁶ The United States often uses RUDs to further its own aims, as well as to maintain the legal supremacy of the Constitution (to be discussed later) vis-à-vis reform demands emanating from international treaties. U.S. ratifications of the UN International Covenant on Civil and Political Rights, and conventions on genocide, torture and racial discrimination were all accompanied by RUDs.³⁷ It is important to note that the U.S. is not alone in its use of RUDs, as “France opted out of NATO, yet kept a foothold, Britain attaches many reservations to human rights treaties,”³⁸ and Saudi Arabia attached RUDs upon signing the Covenant on the Elimination of all forms of Discrimination against Women (CEDAW).³⁹

Despite the widespread use of RUDs, particular focus is directed at the United States, primarily due to its role as global hegemon, the gravitas it wields in setting international human rights trends, and the discrepancy between its human rights rhetoric and actions.⁴⁰ America often espouses that it leads in “defending liberty and justice [and] will always stand firm for the *non-negotiable*⁴¹ demands of human dignity.”⁴² Despite such statements, “observers expecting a dominant role for human rights in U.S. foreign policy will always be disappointed.”⁴³ The United States has long followed a mantra of pursuing its own goals, both unilaterally and in international frameworks, with particular emphasis on American sovereignty and the supremacy of the Constitution.⁴⁴ Characterized as 'American exceptionalism,' U.S. treaty behavior is defined by exemptions, whether by reservation, non-ratification or non-compliance. America:

36 K. M. Smith, 31-32.

37 John W. Dietrich, “U.S. Human Rights Policy in the Post-Cold War Era,” *Political Science Quarterly* 121, no. 2 (2006): 284.

38 Antonia Chayes, “How American Treaty Behavior Threatens National Security,” *International Security* 33, no.1 (2008): 48.

39 K. M. Smith, 31.

40 John R. Crook, “United States Boycotts Durban Review Conference, Will Seek Election to Human Rights Council,” *The American Journal of International Law* 103, no.2 (2009): 338.

41 Emphasis added.

42 Dietrich, 272. - President Bush 2002 State of the Union Address

43 *Ibid*, 269.

44 Chayes, 46.

“[denies] jurisdiction to human rights law within its own domestic law,”⁴⁵ [and operates in] “the cathedral of human rights...more like a flying buttress than a pillar – choosing to stand outside the international structure, supporting the international human rights system but without being willing to subject its own conduct to the scrutiny of the system.”⁴⁶

In order to understand American decision-making, one must delve into the role of the American Constitution, and domestic legal considerations.

U.S. treaty behavior often perplexes other state actors, yet American decisions are not merely the whims and fancies of an arrogant hegemon; rather, they are grounded in the American rights tradition. International criticisms of American human rights policies are wide-ranging, criticizing American inaction and perceived recalcitrant lobbying, causing “the international credibility of the United States [to be] shaken and its reliability as a treaty-negotiating partner with foreign countries [put] in doubt.”⁴⁷ Indeed the U.S. was voted off the UN Human Rights Commission in 2001, only returning after closed door discussions.⁴⁸ Constitutional supremacy and American exceptionalism have been the driving force behind the slew of U.S. refusals to ratify human rights treaties since WWII.⁴⁹ Despite having played a leading role in the creation of the U.N. and the Universal Declaration of Human Rights (UDHR),⁵⁰ there exists a strong tradition of constitutional literalism and preference for domestic law in the American legislature and judiciary. The early 1950s saw the emergence of Brickerism, named after Senator John Bricker, who sought a constitutional amendment to make all treaties entered into by the U.S. to be non-self-executing.⁵¹ Bricker sought to “bury the so called Convention on Human Rights so

45 Michael Ignatieff, “Introduction,” in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton: Princeton University Press, 2005), 3.

46 Majorie Cohn, “Resisting Equality: Why the U.S. Refuses to Ratify the Women's Convention,” *Thomas Jefferson Law Review* 27, no.1 (2004): 25.

47 *Ibid.*, 23.

48 *Ibid.*, 25.

49 W.A. Fletcher, “International Human Rights and the Role of the United States,” *Northwestern University Law Review* 104, no.1 (2010): 305.

50 Dietrich, 271.

51 *Ibid.*, 285.

deep that no one holding high public office will ever dare to attempt its resurrection.”⁵² Bricker's bill was defeated by a single vote, yet his sentiments, specifically his uncompromising defense of the Constitution, continued to influence American policy.

American skepticism towards international treaties is not new, with Federalist Paper No. 15 stating, “little dependence is to be placed on treaties which have no other sanction than the obligations of good faith...[and are] subject to observance and non-observance as the interests or passions of the contracting Powers dictate [*sic*].”⁵³ Echoing Bricker's motion, the Supreme Court in 2008 ruled that all ratified treaties were to be treated as non-self-executing, unless explicitly stated.⁵⁴ Bricker's hostility towards international human rights treaties, was also echoed by Ronald Reagan who described CEDAW as “leading to sex and sexual differences [being] treated as casually and amorally as dogs and other beasts treat them.”⁵⁵ Despite being signed by Jimmy Carter, CEDAW only underwent ratification in 1994 by Bill Clinton, and only then after several RUDs were attached.⁵⁶ U.S. RUDs were based upon constitutional limitations and divisions of power. CEDAW's clause guaranteeing women's right to privacy (concerning access to contraception and abortion) was seen as being trumped by the First Amendment⁵⁷ guarantee of religious freedom.⁵⁸ The U.S. also categorized many women's issues such as family planning, childcare, marriage and domestic violence as private sphere concerns, and consequently beyond the jurisdiction of the government.⁵⁹ Other U.S. reservations exempted America from enacting

52 *Ibid.*

53 Jeremy Rabkin, “American Self-Defense Shouldn't be too Distracted by International Law,” *Harvard Journal of Law and Public Policy* 30, no. 1 (2006): 36-37.

54 Elizabeth Bartholet, “Ratification of the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective,” *Annals of the American Academy of Political and Social Science* 633, no. 1 (2011): 83.

55 Cohn, 18.

56 Dietrich, 270.

57 Crook, “U.S. Boycotts Durban” - the importance of religious sanctity was also behind U.S. refusal to participate in the 2009 review round of the Durban World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, criticizing the conference's specific mention of Israel. America contested that the conference represented an unworkable impasse concerning religious defamation and freedom of speech

58 Cohn, 20.

59 Bartholet, 85.

statutes requiring comparable worth (equal pay) and paid maternity leave legislation. CEDAW required evidence of either an impact or purpose when determining rights claims, whereas the U.S. Constitution required *both* an impact and purpose to deal with equal rights violations.⁶⁰ American RUDs concerning CEDAW were seen as contravening the Vienna Convention on the Laws of Treaties (VCLT). The VCLT states that reservations that object and run counter to the spirit of the treaty are not permitted. Consequently, the U.S., along with Iran, Somalia and Sudan, remains one of the few nations not to have ratified CEDAW.

U.S. reservations have also stalled ratification of the Convention on the Rights of Child (CRC), with American lawmakers and officials citing conflict between treaty clauses and constitutional text.⁶¹ This is due to the fact that “the validity of treaty guarantees that go beyond constitutional guarantees are questionable and treaties that would require the U.S. to change laws are problematic.”⁶² CRC clauses guaranteeing child rights were not accepted in the U.S. for the Constitution does not recognize children specifically, nor does it recognize that children or adults have such affirmative rights.⁶³ In terms of “federal and state constitutional rights, the U.S. is famous for its negative rights tradition”⁶⁴—namely prohibitions against undue state influence. The U.S. Constitution, in this regard, is rather archaic when compared to the post-war European constitutions.⁶⁵ Consequently, state powers to protect children's rights are constrained by constitutional rights of parents to be free from government intervention.⁶⁶ The CRC also restricts interracial and international adoption policies, advocating sociocultural and ethnic continuity to be in the best interests of children. The U.S. opposed this clause, for it would require the re-institution of racial-matching policies. Such policies had previously limited adoption and foster

60 Cohn, 22.

61 Ignatieff, 3.

62 Dietrich, 284.

63 Bartholet, 91.

64 *Ibid.*

65 Fletcher, 305.

66 Bartholet, 86.

care opportunities for African-American children. The 1994 Multiethnic Placement Act outlawed the use of race and culture in circumscribing adoption opportunities.⁶⁷ Adoption of the foreign CRC would in turn require overturning domestic legislation, emanating from local democratic institutions.

U.S. opposition to supplanting domestic with internationally-crafted legislation is grounded in the notion of internationalism as “a battering ram against free and democratic societies and traditional values.”⁶⁸ Such sentiments inform American decisions that at times perplex the international community, such as its refusal to sign the 1997 Land Mine Treaty, a class of munitions which especially endanger children. Similarly, U.S. efforts towards rectifying the issue of child soldiers have been slow, due to America's own policy of actively recruiting seventeen-year-olds.⁶⁹ Congress enjoys wide discretion when entering into and imposing guidelines for treaty compliance, with the Constitution not assigning any role to the courts in dealing with treaty processes. Consequently, treaty obligations are viewed through legislative terms, with Congress seeing its power being infringed upon by international laws.⁷⁰ The role of Congress in turn allows for “ordinary federal statutes to supersede the most solemn treaty commitments if the statute is enacted after treaty ratification.”⁷¹

The ability of domestic legislation to override treaty terms can have huge importance. In 1998, the Supreme Court allowed the execution of a Paraguayan national charged with murder. The convicted appealed the decision in *Breard vs. Greene*, stating that he was not informed of his right to contact his consulate. *Breard* claimed that this in turn violated his political rights and the Vienna Convention on Consular Relations (VCCR).⁷² This objection was overruled by the

67 *Ibid.*, 81.

68 Cohn, 18. - Cecilia Royals of the National Institute of Womanhood commenting on international support for CEDAW

69 Dietrich, 285.

70 Culpepper, 736.

71 Rabkin, 35.

72 Chayes, 64.

Supreme Court, which cited the Anti-Terrorism & Effective Death Penalty Act, a domestic law that superseded and nullified U.S. treaty obligations under the VCCR.⁷³ Similarly in 2008, Mexico launched a class action suit (Medellin vs. Texas) against the U.S. in the International Court of Justice (ICJ), on behalf of Mexican nationals in U.S. custody with death sentences. Mexico claimed that many prisoners had not been made aware of their rights under the VCCR.⁷⁴ ICJ calls for U.S. courts to abide by the VCCR were echoed by a presidential memorandum by President George W. Bush, who urged the courts to comply with ICJ demands. Medellin vs. Texas saw the Supreme Court reaffirm the supremacy of domestic law, with “neither the [ICJ ruling] nor the president's memorandum constituting directly enforceable federal law.”⁷⁵ The separation of powers in the U.S. results in restricting legal claims from international and executive sources, for “the president has a sworn duty not to 'law' in the abstract, much less to universal principles, but to preserve, protect and defend the Constitution of the United States.”⁷⁶

The almost dogmatic authority enjoyed by the U.S. Constitution is one of the main factors determining American treaty and legal behavior. The significant power and influence of the Constitution in U.S. human rights discourse is not completely unrestricted, nor is it totally separated from international norms. International law does recognize certain human rights and corresponding violations as being exempt from the persistent objector doctrine.⁷⁷ These unassailable dignities are known as peremptory norms; or *jus cogens*.⁷⁸ While only a handful of human rights norms currently qualify as *jus cogens*, state sovereignty is strictly limited in applicable cases. States that contravene *jus cogens* violate some of the most entrenched and 'hard' legal norms. Consequently, the Supreme Court has recognized the U.S. is bound by these norms,

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*, 67.

76 Rabkin, 49.

77 Lau, 495.

78 Culpepper, 736.

thus allowing for some international opinion to dictate U.S. human rights policies.⁷⁹ American human rights policies have routinely come under international criticism, at times resulting in revisions in U.S. practices.

America's frequent use of the death penalty is seen by many in the international community as highly objectionable, specifically considering America's position as a major liberal democracy.⁸⁰ International indignation was voiced in 2002 when the Inter-American Commission on Human Rights, ruled against U.S. death penalty policies. In *Domingus vs. U.S.*, the Commission ruled that the use of the juvenile death penalty violated customary international law, for the prohibition against juvenile executions had achieved *jus cogens* status.⁸¹ The U.S. is also relegated to outlier status as the only country with a policy of juvenile life sentences without parole, a policy in direct contravention of Article 37 of the CRC.⁸² International criticism and the importance of *jus cogens* norms led to the 2005 *Roper vs. Simmons* case, in which the Supreme Court ruled it unconstitutional to execute someone who was a juvenile at the time of their crime.⁸³ *Roper vs. Simmons* saw the Supreme Court acknowledge the role of the CRC,⁸⁴ and:

although [the Supreme Court's] decision in *Roper vs. Simmons* was based on U.S. domestic law – the Cruel and Unusual Punishment Clause of the Eighth Amendment – the Court recognized the degree to which it had been out of step with the rest of the world. The Court wrote 'Article 37 of the UN Convention on the Rights of Child, which every country in the world has ratified, save for the U.S. and Somalia contains an express prohibition on capital punishment for crimes committed by juveniles under 18.'⁸⁵

Similar revisionist sentiments arose in 2003, when the Supreme Court in *Lawrence vs. Texas*, overturned the 1986 *Bowers vs. Hardwick* ruling, which allowed states to implement laws criminalizing homosexuality. The 2003 decision declared anti-homosexuality law to be

79 *Ibid.*

80 United Nations Special Rapporteur, "UN Human Rights Officials Berate U.S. Human Rights Policies and Practices," *The American Journal of International Law* 103, no.3 (2009): 595.

81 Lau, 496.

82 Bartholet, 83.

83 Fletcher, 305.

84 Bartholet, 85.

85 Fletcher, 305.

unconstitutional. The Court, rather belatedly, acknowledged the precedent set by the European Court of Human Rights, which had decriminalized homosexuality in its 1981 *Dudgeon vs. United Kingdom* ruling.⁸⁶

Efforts to bring U.S law into line with international practices via domestic legal reform rather than treaty obligations are a key characteristic of American human rights policy. It is important to note that while the U.S. often lags behind European and other nations in terms of human right legislation and treaty ratification; American human rights engagement should not be seen as purely reactionary. As previously mentioned, the U.S. played a key role in establishing UDHR in 1948. Moreover, it supported the creation of the UN Human Rights Commission in 1993, and while it voted against the UN Rights Council in 2006, it did so to express its wish for a *stronger* mandate.⁸⁷ To characterize American attitudes as purely unilateral is false; rather, the U.S. engages in “multilateralism a la carte.”⁸⁸ The U.S. participates in human rights dialogue, and while often not signing treaties, does offer its own legal experience to the discussion. In 2003, the U.S. stated that it did not support the concept of an international instrument to maintain equal rights for disabled persons, preferring to rely on the Americans with Disabilities Act.⁸⁹ From 2003 to 2006, the U.S. increasingly engaged with other nations on various articles and issues in international law concerning the rights of the disabled. Specifically, America provided an experts panel and written documentation on its own disabilities legislation in order to help nations without such laws to better formulate their own domestic laws. The Americans with Disabilities Act helped inform the Convention on the Rights of Persons with Disabilities, for U.S. legal practice in this area was at the forefront of global disabilities rights development.⁹⁰ The Disabilities Convention demonstrates the active role that the U.S. can assume in helping

86 *Ibid.*

87 Dietrich, 279.

88 Chayes, 46.

89 John R. Crook, “U.S. Joins Consensus on Disability Treaty, but Not Expected to Sign,” *The American Journal of International Law* 101, no.2 (2007): 491.

90 *Ibid.*, 492.

shape international treaties, without compromising domestic judicial sovereignty, thereby “advancing U.S. policy interests including advancing democracy and promoting U.S. values on social issues.”⁹¹

Such recent engagement on the part of the U.S. is welcomed by the international community, yet America continues to be perceived as flouting international treaty proceedings and multilateral efforts. American insistence on constitutional supremacy has often hampered the ratification processes of human rights treaties. Despite such trends, there exists substantial judicial and constitutional material favoring international rights cooperation. The tools of unilateral constitutional literalists can also be used to advocate stronger international law engagement. The American Founding Fathers were not wholly isolationist; they recognized that the nascent America existed in a multipolar world. Proponents of greater American involvement in international human rights dialogue can counter the obstructionist methods of die-hard constitutionalists by citing the very document to which they so dearly cling. Advocates for a more cosmopolitan and treaty-based policy outlook echo President Clinton's 1998 executive order stating that the U.S. government “fulfill, respect and implement its obligations under international human rights treaties to which it is a party.”⁹²

As seen in the case of *Medellin vs. Texas*, executive orders of the President have little impact on judicial rulings, yet there exists judicial and constitutional support for Clinton's sentiments. International law has consistently been upheld by U.S. laws,⁹³ as demonstrated by the long standing 1801 *Charming Betsy* rule, stating that “the laws of the United States ought not to be construed as to infract the common principles and usages of nations, or the general doctrines of national law [*sic*].”⁹⁴ Such notions were extrapolated by Justice Marshall, who in

91 *Ibid.*

92 Dietrich, 279.

93 Petree, 180.

94 *Ibid.*, 169.

1809 argued that “treaties should be viewed as self-executing whenever a right grows out of or it protected by a treaty.”⁹⁵ Article 1 S.8.c10 of the U.S. Constitution imbues Congress with the power to punish “offenses against the law of nations.”⁹⁶ The importance of said 'laws of nations' is further demonstrated by the U.S. Alien Tort Claims Act (ATCA). Enacted in 1789, the Act allowed non-Americans to sue foreign leaders in U.S. courts for violations of customary international law. The ATCA provides recourse in the case of violations of international norms that are accepted by enough states to be “*specific, universal and obligatory*.”⁹⁷ ACTA's emphasis on universal international norms, as well as providing a forum for redressing violations of international law, precedes the strikingly similar mandate of the International Criminal Court (ICC)—a key institution in prosecuting human rights violators—by more than 150 years. Many American critics of the ICC argue that its mandate infringes on state sovereignty and the Constitution. Specifically, critics argue that the ICC would unlawfully adjudicate over U.S. citizens in America, from abroad. Ironically, while the U.S. has refused to ratify the ICC due to the reservations mentioned above, the exact same criticisms exist concerning ATCA, for the U.S. exercises the ability to unilaterally judge foreign nationals and leaders who “despite state recognition of international norms, they have not necessarily consented to allowing U.S. federal courts to adjudicate claims involving those norms.”⁹⁸

Of even greater significance for American implementation of modern human rights treaties is Article 6—the Supremacy Clause—which states that “all treaties made or which shall be made under Authority of the United States shall be supreme law of the land [*sic*].”⁹⁹ Article 6 allows congressional legislation enacting treaty obligations to supersede other constitutional concerns, undermining many arguments of human rights treaties opponents touting concerns

95 *Ibid.*, 182.

96 Culpepper, 739.

97 Gary Clyde Hufbauer & Nicholas K. Mitokostas, *Awakening Monster: The Alien Tort Statute of 1789* (Washington: Institute for International Economics, 2003), 3. - emphasis added.

98 Lau, 506.

99 Culpepper, 739.

over constitutional integrity.¹⁰⁰ This notion was further extrapolated upon in the 1887 case of *U.S. vs. Arjona*, in which it was ruled that the law of nations “may compel Congress to take necessary steps to conform U.S. domestic law to international norms.”¹⁰¹ Of particular importance was the Supreme Court's statement that Congress was not required to cite international law (ratified treaties) as an explicit justification to change domestic law; rather, the existence of a recognized international obligation *alone* sufficed. Such statements in both the Constitution and U.S. judicial precedent played a key role in the outcome of *Roper vs. Simmons*, with the Supreme Court referencing Article 3, which mandates that the conduct of individual states “relative to laws of nations and performance of Treaties, conform to these [treaty] laws [*sic*].”¹⁰² The importance of the Supreme Court's ruling in *Roper vs. Simmons* was that it cited Article 3's insistence on complying with treaty laws, yet the laws in question—those of the CRC, specifically Article 37—had not been ratified by the U.S. In other words, the Supreme Court brought about legal changes, not due to legally binding and accepted treaty clauses, but merely due to the existence and corresponding moral authority of international human rights norms.

The evolution of human rights dialogue as well as the implementation and enforcement of said rights continues to be a major topic in international politics. The establishment of an international body of treaties, laws and norms has slowly come to define what are inherently highly complex and often nebulous concepts. The importance of international agreement, cooperation and enforcement continues to grow, and all nations are faced with the task of adopting and adapting to changing ideas and expectations. The United States is not exempt from the often difficult and legally intricate circumstances that arise due to the growing aegis of human rights. American human rights policy has long been characterized by a heavy reliance on domestic initiative and constitutional law. Said reliance has often resulted in the U.S. remaining

100 *Ibid.*

101 *Ibid.*, 741.

102 *Ibid.*, 742.

outside many key international treaties, as it struggles with an inherent conflict of interests. Many see American refusal to partake in multilateral undertakings as the characteristic intractability of a global hegemon, while others as a fundamentally antagonistic predisposition to multilateralism and international cooperation at large. The supremacy of the Constitution has long been used as a justification for the U.S. However, America has not remained immune to collective expectations and values. Human rights advances, whether reactions from international progress or fueled by internal re-evaluation, beckon.

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BUSINESS AND GOVERNANCE

By André Paul Wilkie

Growing government deficits and calls to reduce the size of government since the 1970s have led to demands for bureaucracy reform. These calls have given rise to various models of government, including new public administration and New Public Management (NPM). Both these models draw on neoliberal economics with a focus on privatization, deregulation, contracting out and private-public partnerships. Essentially, these models seek to transform the bureaucracy by making it more similar to the private sector. However, these calls for reform have triggered fears that public sector accountability will become a secondary concern and that new models cause greater and more severe ethical conflicts for public administrators. NPM and the emphasis on private-public partnerships has the *potential* to produce greater and more severe ethical conflicts for bureaucrats because of the unique structural nature of public-private partnerships, the different underlying goals between the public and private sectors and the different values at the root of both sectors. An initial review of the literature is required to construct a definition of NPM and explore the various definitions of public-private partnerships.

Defining New Public Management and Public Private Partnerships

Before undertaking an analysis of the factors contributing to the potential for increased and/or more severe ethical conflicts for public administrators, it is useful to provide a survey of literature to help define the meaning of accountability as it pertains to new public management and public-private partnerships. A cohort of George Washington University professors, led by John Forrer, note that public private partnerships have become a tool increasingly used by governments in the face of growing deficits, which force the need to implement alternative service and delivery mechanisms. Additionally, they argue that the use of these mechanisms is

likely to continue into the future as governments continue to face difficult financial situations.¹⁰³

An initial definition of public-private partnerships (PPPs) is provided by these same authors, who distinguish public-private partnerships from other forms of ties with the private sector like contracting out. They define PPPs as:

...ongoing agreements between government and private sector organizations in which the *private organization participates in the decision-making and production of a public good or service that has traditionally been provided by the public sector and in which the private sector shares the risk of that production.*¹⁰⁴

Although this definition is somewhat limiting by not allowing for the possibility of more traditional relationships, such as contracting out, its emphasis on shared decision-making highlights the deepening integration between the two sectors in the provision of *public* goods. Their definition also provides a useful framework by emphasizing the distribution of risk between the two partners, which distinguishes PPPs from other government-private sector arrangements in which one partner retains all of the risk. Another definition of PPPs takes a different view than the one provided by Forrer and defines PPPs as “*any contractual agreement between the public sector and a private entity that allow[s] for private sector participation in the delivery of [public goods]*”.¹⁰⁵ This definition is overly broad because it encompasses any form of agreement from a simple contract to more complex, long-term agreements with joint responsibility. For the purposes of this essay, Forrer’s definition is more favourable because of its emphasis on the greater integration of the private sector into the provision of public sector goods, which is likely to increase private sector influence and the potential for ethical conflicts on the part of public administrators.

¹⁰³. John Forrer, James Edwin Kee, Kathryn E. Newcomer, and Eric Boyer, “Public-Private Partnerships and the Public Accountability Question,” *Public Administration Review* 70, no. 3 (2010): 475, <http://search.proquest.com/docview/853274318?accountid=15115>.

¹⁰⁴. *Ibid.*, 476 (emphasis added).

¹⁰⁵. Jeffrey N. Buxbaum and Iris N. Ortiz, “Protecting the Public Interest: The Role of Long-term Concession Agreements for Providing Transportation Infrastructure,” *Keston Institute for Public Finance and Infrastructure Policy* (2007): 4, <http://www.usc.edu/schools/sppd/keston/pdf/20070618-trans-concession-agreements.pdf>. (emphasis added)

Public-private partnerships are part of NPM, a larger transformative approach to government, premised on a Taylorist version of managerialism, seeking indirect control as a means of replacing direct authority and allowing the markets to coordinate society and the economy in the hopes of increasing efficiency.¹⁰⁶ Essentially, the goal of new public management is to move away from the traditional government bureaucracy and towards a more business-like model of government to provide what is deemed to be a better delivery of goods and services. NPM advocates for the implementation of both practices and values from the private sector.¹⁰⁷ In building this framework, however, it is noted that any organization delivering public goods must be responsible and accountable to the public trust, thereby preventing either party from being absolved of responsibility to the public good.¹⁰⁸

A final term that needs to be defined is ethics, which can be equated to integrity and accountability. One definition of integrity is “acting in agreement with relevant moral values, standards, norms and rules.”¹⁰⁹ This definition touches on one of the issues that will be highlighted by this paper: if acting with integrity means acting on “relevant moral values” then the different values underlying the private and public sector need to be reconciled or they will likely pose a problem. Another definition of ethics asserts that they serve “as a guide to conduct.”¹¹⁰ Much like the previous definition, the issue of which norms and values should be considered is a key factor contributing to the potential for conflicts of interests, which will be further elucidated in this paper. This issue was recognized by Richard Ghere when he noted that

¹⁰⁶. Emile Kolthoff, Leo Huberts, and Hans Van Den Heuvel, “The Ethics of New Public Management: Is Integrity At Stake?” *Public Administration Quarterly* 30, no. 4 (2007): 400-403, <http://search.proquest.com/docview/226977479?accountid=15115>.

¹⁰⁷. Zeger Van Der Wal, Leo Huberts, Hans Van Den Heuvel, and Emile Kolthoff, “Central Values of Government and Business: Differences, Similarities and Conflicts,” *Public Administration Quarterly* 30, no. 3 (2006): 323, <http://search.proquest.com/docview/226966223?accountid=15155>.

¹⁰⁸. Paul C. Light, *The True Size of Government* (Washington: Brookings, 1999), 184, quoted in James P. Pfiffner, “The Public Service Ethic in New Public Personnel Systems,” *Public Personnel Management* 28, no. 4 (1998): 549, <http://search.proquest.com/docview/215946097?accountid=15155>.

¹⁰⁹. Kolthoff, Huberts, and Van Den Heuvel, “The Ethics of New Public Management,” 409.

¹¹⁰. Van Der Wal, Huberts, Van Den Heuvel, and Kolthoff, “Central Values of Government and Business,” 316.

ethics seem to be “an afterthought”¹¹¹ when considering reforms to government and that any public administrator trying to implement change will need to reconcile democracy with this new form of “public entrepreneurship.”¹¹²

Structural Differences between Traditional Bureaucracy and NPM

The use of alternative service delivery mechanisms in NPM will result in different structural mechanisms to ensure accountability. In a Westminster system like Canada, accountability is usually ensured through a vertical hierarchy: public servants answer to ministers who must answer to Parliament who must answer to the citizenry at elections.¹¹³ The result is that civil servants have a strong incentive to maintain ethical standards given the vertical oversight imposed upon them by the chain of command. In fact, “vertical hierarchy” is seen to be the primary mechanism in traditional organizational structures. This primary control has been developed in parallel with accountability to other governmental organizations (for example Parliament) and the use of impersonal standards.¹¹⁴ Additionally, within this system, each position has the power vested in it by the hierarchical structure but no more.¹¹⁵ The result is an organization that minimizes the potential for ethical conflicts in the public service.

The problem with NPM is that this check on ethical conflicts and mechanisms to ensure accountability are slowly disappearing and being replaced with other structures. In PPP agreements, the vertical model is replaced by a horizontal form of governance.¹¹⁶ This

¹¹¹. Richard K. Ghere, “Aligning the Ethics of Public-Private Partnerships: The Issue of Local Economic Development,” *Journal of Public Administration Research and Theory* 6, No. 4 (1996): 600, <http://www.jstor.org/stable/1181907>.

¹¹². Carl J. Bellone and George F. Georle, “Reconciling Public Entrepreneurship and Democracy,” *Public Administration Review* 52, No. 4 (1992): 130-134, quoted in Ghere, “Aligning the Ethics,” 601.

¹¹³. Darrin Grimsey and Mervyn K. Lewis, *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance* (Northampton: Edward Elgar Publishing, 2004): 156.

¹¹⁴. Forrer, Kee, Newcomer and Boyer, “Public-Private Partnerships,” 478.

¹¹⁵. Donald F. Kettl, “Managing Indirect Government,” in *The Tools of Government: A Guide to New Governance*, ed. Lester M. Salamon (New York: Oxford University Press, 2002), 491.

¹¹⁶. Forrer, Kee, Newcomer and Boyer, “Public-Private Partnerships,” 478.

phenomenon is not surprising given that PPPs by nature diffuse risk, responsibility and decision-making power. As a logical consequence of implementing PPPs, then, a second overarching horizontal relationship between partners will evolve, in addition to the vertical hierarchy well-established within government. In fact, this transformation is so critical to NPM and PPP that it held to be a defining characteristic.¹¹⁷ In examining ActewAGL, an Australian PPP in the utilities sector, Roger Wettenhall concludes that the horizontal and non-hierarchical relationship between the two organizations is a key factor in allowing it to be defined as a PPP.¹¹⁸ The result of these changes is that one of the major control mechanisms that has evolved to ensure accountability in the public sector is being replaced as a result of the evolution of government through NPM.

An alternative description of this phenomenon is provided by James Pfiffner when he states that “accountability through hierarchy is being replaced by accountability through contract.”¹¹⁹ In fact, Pfiffner goes on to correctly argue that by introducing private partners, the public service and public administration have essentially become another route for the pursuit of personal interest.¹²⁰ The difficulty therefore lies in developing the ethics of the public service in individuals who do not work directly for the public service.¹²¹ The problem here lies in the fact that contracting situations are not adapted to hierarchical relationships, and thus the government

¹¹⁷. J.M. Brinkerhoff, “Partnership as a social network mediator for resolving global conflict: the case of the World Commission on Dams,” *International Journal of Public Administration* 25, no. 11, 1285 quoted in Roger Wettenhall, “ActewAGL: a genuine public-private partnership?” *International Journal of Public Sector Management* 20, no. 5 (2005): 395, <http://search.proquest.com/docview/234488551?accountid=15115>.

¹¹⁸. Wettenhall, “ActewAGL,” 407.

¹¹⁹. Pfiffner, “The New Public Service Ethic,” 549.

¹²⁰. H. George Frederickson, *The Spirit of Public Administration* (San Francisco: Jossey-Bass, 1997), 195-196 quoted in Pfiffner, “The New Public Service Ethic,” 551.

¹²¹. *Ibid.*, 551-552.

cannot obligate an equal partner to take on any action it does not desire.¹²² The other issue is that vertical hierarchies are not well suited to the horizontal nature of PPP mechanisms.¹²³

There are three sources creating the problems stemming from this change in structure. In managing these relationships, government has not changed its approach and attempts to impose a vertical hierarchy on horizontal partnerships.¹²⁴ Second, by moving the relationship and transaction away from the previously described Westminster hierarchy, PPPs remove public-sector activities from public scrutiny. This phenomenon raises the potential for ethical conflicts amongst public administrators, given that they will be subject to less oversight, and has the potential of creating an environment where workers perceive that “more can be gotten away with.”¹²⁵ Finally, and perhaps most importantly, the government’s lack of experience with these types of arrangements creates a reliance on third parties that may also be beholden to the private sector partner, thereby generating a conflict of interest. This issue was mentioned in the context of the transportation infrastructure industry but is not by definition unique to it.¹²⁶ The potential result is that public administrators working to develop a PPP agreement may, because of relative inexperience, be duped or misled into accepting an agreement that creates an inherent conflict of interests.

Although structural issues may seem to be a secondary concern, the removal of a traditional accountability mechanism—vertical accountability—raises the prospect of increased ethical conflicts for government administrators by exposing them to a new form of governance to which they have not yet adapted and in which they must relying on third parties. This does not guarantee an increase in ethical conflicts but it raises the prospect that bureaucrats confronted by

¹²². Ibid.

¹²³. Ibid.

¹²⁴. Ibid., 492.

¹²⁵. Robert Agranoff and Michael McGuire, “Big Questions in Public Network Management Research,” *Journal of Public Administration Theory* 11, no. 3 (2001): 310, <http://search.proquest.com/docview/60135826?accountid=15155>.

¹²⁶. Buxbaum and Ortiz, “Protecting the Public Interest,” 6.

previously unknown situations and without the traditional guarantee of accountability will face increased ethical dilemmas.

The Differing Goals of the Private and Public Sectors

The introduction of business practices to the public sector as a part of NPM and a renewed focus on managerialism further creates the potential for conflicts of interest because of the very different goals of the public and private sectors. Any private sector partner is first and foremost responsible to its shareholders and not to the public. The shareholders' expectation is not on providing equal or fair access but rather in recovering their capital investment and ideally generating a return or profit on it.¹²⁷ To illustrate this, Jeffrey Buxbaum and Iris Ortiz in *Protecting the Public Interest: The Role of Long-term Concession Agreements for Providing Transportation Infrastructure* examined the growth of PPPs in the transportation infrastructure sector in the United States and found that one of the major driving forces for growing private investment was the "...long-term, stable nature of revenue streams."¹²⁸ Although they focus solely on the transportation industry, this basic principle can be extrapolated to other PPPs, because private companies will always invest in order to generate a profit or stable cash flow and not to ensure the equal provision of a public good. The problem then with PPPs is that the private sector will focus solely on the most profitable ventures while ignoring others that may not be profitable but where the service is still required.¹²⁹

In fact, this change in dynamic requires a new form of control to ensure that the quest for profit will not undermine the equal and fair provision of a public good.¹³⁰ This change in dynamic alludes to the larger issue of ensuring that public funds are being used and managed

¹²⁷. Ibid., 8.

¹²⁸. Ibid., 4.

¹²⁹. Ibid., 8.

¹³⁰. Forrer, Kee, Newcomer and Boyer, "Public-Private Partnerships and the Public Accountability Question," 477.

appropriately—a task that falls to the Auditor General, whose role is to ensure the accountability of the government.¹³¹ However, given the inclusion of a private partner and the lack of a vertical hierarchy, there is an inherent danger that public funds will be mismanaged or that ethical conflicts will ensue. The potential for these conflicts is exacerbated by the aforementioned lack of government experience in dealing with these types of partnerships, creating the potential for the private sector’s goals to override those of the public sector. The resulting conflict of interest for public servants will then center on how to reconcile the need for public accountability with the private sector’s goal of generating a profit. Donald Kettle identifies the need for this reconciliation and the varying motivations of each actor as two of the major challenges facing governments in PPPs.¹³² If the government requires private sector funds to launch a program but doing so will result in inequitable service delivery, is the government being unethical by accepting the private sector’s funds? There is no easy answer to this question but the growing use of PPPs to help governments cut cost will require that this and other similar questions be considered. The importance of these questions is further supported by Paul Posner’s argument that, at the outset of a project, gaining the support of the private partner is the most important task.¹³³ From the outset, then, there exists a conflict of interest for public administrators who must potentially sacrifice their goals to ensure the participation of a private sector partner.

The potential danger of these underlying goals is that the free market will by nature tend to produce inequalities because it is designed to be efficient but not fair, while the government attempts to maintain a high level fairness over efficiency.¹³⁴ Although this may seem like an issue of differing values, it also affects overarching goals, since the private sector will not

¹³¹. Grimsey and Lewis, “Public Private Partnerships,” 157.

¹³². Kettle, “Managing Indirect Government,” 492.

¹³³. Paul L. Posner, “Accountability Challenges of Third Party Government,” in *The Tools of Government: A Guide to New Governance*, e. Lester M. Salamon (New York: Oxford University Press, 2002), 525.

¹³⁴. Kolthoff, Huberts, and Van Den Heuvel, “The Ethics of NPM,” 403.

Van Der Wal, Huberts, Van Den Heuvel, and Kolthoff, “Central Values of Government and Business,” 326.

necessarily focus their efforts on the goal of ensuring equitable service delivery when they are being driven by profit and a responsibility to a narrow group of shareholders. As a result, the potential arises for public administrators to be caught between two courses of action: providing limited but equal service and providing more service in an unequal manner. This conflict emerges due to a combination of the private sector's motivation for profit, the need to garner the support of the partner at the outset of the project and the private sector focus on efficiency over equality. The problem is only worsened by the aforementioned lack of government experience with this type of agreement and their subsequent dependence on the private sector in the face of austerity programs.

Different Values Underlying the Public and Private Sector

A discussion regarding ethical conflicts caused by the implementation of NPM and PPPs would not be complete without a discussion about the values underlying both sectors, given that managerialism is based on the adoption of business values in addition to business techniques by the public sector.¹³⁵ As a starting point, the difference in values can be understood to be as simple as a private sector focus on efficiency and a public sector focus on effectiveness and equity.¹³⁶ However, this difference is only one aspect of the dispute. A comprehensive comparison of the values of both sectors is provided by Zeger Der Wal. Among the values he identifies as being critical to the public sector are integrity, responsibility, restraint, impartiality and transparency/openness.¹³⁷ These public sector values are complemented by the principles of democratic accountability, the need for citizen input, the openness required in a democracy and

¹³⁵. Kolthoff, Huberts, and Van Den Heuvel, "The Ethics of NPM," 404-05.

¹³⁶. Kolthoff, Huberts, Van Den Heuvel, "The Ethics of NPM," 423.

¹³⁷. Van Der Wal, Huberts, Van Den Heuvel, and Kolthoff, "Central Values of Government and Business," 331, 333.

the public good.¹³⁸ In other words, the public sector is founded on values based on democracy, the public good and the need for accountability. By contrast, core private sector values include expertise, entrepreneurship, innovativeness, profitability and self-fulfillment.¹³⁹ Alternatively, entrepreneurialism has been characterized by a resistance to rules, preferring action even if it undermines accountability.¹⁴⁰ These are the values that the private sector is being encouraged to adopt, yet they are the polar opposite of the values cherished by the public sector. The result is that the fundamental values based on democracy and openness could be replaced by those driven by market forces. In fact, some scholars have argued that all that will remain is a “core of market orientation to economic efficiency in the public sector.”¹⁴¹

This is not to say that there are no similar values between the two sectors’ codes of conduct. Indeed, “responsibility,” “accountability,” and “professionalism” are found in both sectors as core values while “communication” and “transparency” seem to have similar meanings.¹⁴² However, there can also be significant differences in the interpretation of values by each sector. For example, “accountability” in the private sector relates to output while in the public sector it relates to the process.¹⁴³ Even though it is a “core value” held by both sectors, a gradual adoption of private sector values might lead to accountability being redefined in the public sector.¹⁴⁴ The transition and gradual adoption of private sector values would ultimately mean a move away from values like impartiality, transparency and integrity, which are strongly associated with the public sector, towards values like effectiveness, profitability, self-fulfillment

¹³⁸. Carl J. Bellone and George Frederick Goerl, “Reconciling Public Entrepreneurship and Democracy,” *Public Administration Review* 52, no. 2 (1992): 131-32, <http://www.jstor.org/stable/976466>.

¹³⁹. Van Der Wal, Huberts, Van Den Heuvel, and Kolthoff, “Central Values of Government and Business,” 336.

¹⁴⁰. Kolthoff, Huberts, and Van Den Heuvel, “The Ethics of New Public Management,” 405.

¹⁴¹. Richard C. Box, Gary S. Marshall, B.J. Reed, and Christine M. Reed “New Public Management and Substantive Democracy,” *Public Administration Review* 61, no. 5 (2001): 613, <http://search.proquest.com/docview/197171830?accountid=15115>.

¹⁴². Van Der Wal, Huberts, Van Den Heuvel, and Kolthoff, “Central Values of Government and Business,” 339-40.

¹⁴³. *Ibid.*, 340.

¹⁴⁴. *Ibid.*, 342.

and entrepreneurship, more closely associated with the private sector.¹⁴⁵ The result of the adoption of NPM and PPPs is that public administrators will increasingly be required to adopt foreign values that may create ethical conflicts by requiring them to move away from democracy in favour of profitability. Additionally, the shift away from integrity and transparency means that decisions will likely be made in a more secretive fashion, decreasing the public's ability to ensure the accountability of the public sector and leading to the potential for increased conflicts of interest in situations where public administrators feel they will not be caught.

Another issue is that efforts at deregulation to increase efficiency will invariably diminish equality, fairness and due process.¹⁴⁶ Regulation is important in that it entrenches the need for the public sector to protect citizens and for public administrators to be selfless. Regulation also plays a key role in preventing the public sector from abusing the revenue streams of government, since small thefts can go unnoticed but have a significant cumulative impact.¹⁴⁷ In other words, the trend towards deregulation to increase efficiency (based on the underlying values of NPM) is removing an effective mechanism for ensuring the control of public monies and removing a formal expression of the key public sector values. The result is an environment with increased temptation for public servants to misuse their power.

A final challenge facing the public sector in the adoption of NPM and the implementation of PPPs is transferring the requisite values to all stakeholders, including corporations and private sector partners.¹⁴⁸ This challenge is a result of the different goals mentioned above: private sector employees work to increase their company's financial performance while those in the public

¹⁴⁵. Ibid.

¹⁴⁶. H. George Frederickson, "Ethics and the New Managerialism," *Public Administration and Management* 4, no. 2 (1999): 303, <http://www.spaef.com/file.php?id=1103>.

¹⁴⁷. Herbert Kaufman, *Red Tape: Its Origins, Uses and Abuses* (Washington: The Brookings Institution, 1977), 50-53 quoted in Frederickson, "Ethics and the New Managerialism," 305-06

¹⁴⁸. Pfiffner, "The Public Service Ethic," 541

sector are more focused on the public good.¹⁴⁹ Since, as Paul Light argues, the public service includes *any entity* engaged in the provision of public services, corporations also become responsible for protecting the public trust.¹⁵⁰ Thus far, the assumption has been that these new values can be integrated into the existing framework; however, given the growing trend towards deregulation, this may not be the case as the very regulations meant to uphold integrity and accountability are being removed to foster efficiency.¹⁵¹ Thus, not only are the values expected of bureaucrats changing, but the key mechanism for promoting them—codification—is being removed in favour of private sector values like efficiency. As a result, public administrators will increasingly be forced to choose between traditional public sector values and private sector values, creating the potential for ethical conflicts as public servants adapt to a new paradigm with which they have little experience or precedent.

Conclusion

Although NPM and PPPs are still a relatively recent phenomenon and their implementation and evolution are ongoing, it is clear that the potential for ethical conflicts for public administrators exists due to the structural differences between traditional governance mechanisms and managerial structures, different underlying goals and different foundational values. The variations in structural differences are significant given that the horizontal integration lauded by NPM and PPP arrangements results in the removal of vertical authority, which has been a key mechanism for ensuring accountability. The impact of these structural differences is exacerbated by the absence of governmental experience with these mechanisms. The different goals of each sector—profit and investment recovery for the private sector, fair and equitable provision of

¹⁴⁹. Ibid., 547

¹⁵⁰. Light, *The True Size of Government*, 184, quoted in Pfiffner, “The New Public Service Ethic,” 549

¹⁵¹. Alan Doig and John Wilson, “What Price New Public Management?” *Political Quarterly* 69, no. 3 (1998): 269, <http://search.proquest.com/docview/61278259?accountid=15115>.

public goods for the public sector—also result in an increased risk for conflicts of interest for public administrators, especially given an increasing inability to resist private sector pressure in the face of austerity. Finally, the different values underlying each sector mean that public administrators are being exposed to new and unfamiliar values that will have to guide their decision making. These values also reinforce the probability of ethical conflicts because the focus on efficiency from the private sector has led to deregulation: the removal of rules entrenching democratic values such as openness.

Although NPM and PPPs are likely here to stay, there is the need for governments and businesses to work together to develop the required mechanisms to ensure the proper management of public monies and public services. Even if government increases its dependence on the private sector to deliver services in an effort to reduce costs, government cannot ignore its fundamental responsibility to the public: to ensure that it is delivering fair and equitable services and goods to all citizens and not blindly allowing the private sector's pursuit of profit. In the absence of this framework, public distrust of government is likely to rise, especially if there is a perception of businesses being favoured over citizens. In expanding the realm of PPPs and NPM, governments must be cognizant of their unique position as guardians of society.

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Implications of Right-to-Work Legislation in Ontario

Caitlin Dunn

In the face of an expanding global market, Ontario's manufacturing sector is failing to adapt due to rigid and outdated labour policies where there exists no effective check on union power. In order to compete, reform is necessary, and the installation of right-to-work (RTW) legislation is crucial for Ontario's future economic success. Evidencing the coercive influence of unions in Ontario, this proposition has been met by much criticism from those who claim that RTW legislation aims foremost to dismantle Ontario's unions and their purported "benefits", so that capitalism may prosper at the expense of the worker. Yet there is mounting evidence that RTW legislation serves not only to benefit the economy, by creating a more favourable environment to attract investment, but also the workers, who will directly benefit from more accountable and efficient unions. This paper will address the question of whether or not Ontario should adopt 'Wisconsin-style' RTW labour laws to reduce the power of unions. Based on the success of RTW labour laws in the United States, Ontario would benefit substantially from the installation of similar legislation as granting such autonomy to the worker would force the legitimization of unjustifiably powerful unions, while leading to job creation and a more efficient and competitive manufacturing sector. Section one of this paper will outline the liberal and Keynesian-welfare approaches to economics and important labour legislation in Canada and the United States, including RTW labour law and its relevancy to Ontario. The argument against the installation of RTW legislation in Ontario will be addressed in section two, and the case for RTW labour law in Ontario will be addressed in section three, specifically the realities of the union-employer power dynamic, issues of union accountability, and economic benefits of RTW legislation. A brief summary will be offered in section four.

Section One: Topic Outline

Liberal and Keynesian-Welfare Theories

The classical branch of economic liberalism advocates a free market approach whereby, according to liberal theorist Adam Smith, self-serving economic behavior in the context of minimal government interference benefits society as a whole (Howlett, Netherton, and Ramesh 1999:35). In the opinion of neo-classical proponent Alfred Marshall, the price of a market commodity, including labour, is determined according to the forces of supply and demand, specifically the point at which they intersect. According to liberalist theory, in order for unemployment to correct itself, workers must adjust their wages in accordance to price signals in order to increase demand by employers. Similarly, the neo-liberal approach views unemployment as a result of workers being unable, or unwilling, to accept lower wages due to governmental interventionist measures such as minimum wage or unemployment insurance (Howlett et al. 1999:41). On the other hand, the Keynesian approach to economics views government intervention as a necessity to correct market failures. John Maynard Keynes proposed that monetary intervention, through the use of government revenues and expenditures, would break the cycle of economic decline. By this logic, taking measures to increase consumer spending leads to rising consumer and business confidence, and thus employment and economic growth (Howlett et al. 1999:42).

Right-to-Work (RTW): The Canadian and American Context

In the Canadian case, the organization of labour in the modern sense is rooted in the WWII, and post WWII era, most notably with the implementation of the government-issued emergency Order in Council, P.C. 1003 in 1944. This Order in Council, eventually codified into the Industrial Relations and Disputes Act in 1948, granted collective bargaining rights between employers and union representatives. Importantly, in 1946 Justice Ivan Rand of the Supreme

Court ruled in favour of a provision, known as the “Rand Formula,” that made legal the implementation of compulsory dues for all workers in a unionized work environment. Rand argued that all members of the workplace reap the benefits of unionization, thus all members in turn should be subject to regular wage deductions taken in order to fund union pursuits (Canadian Museum of Civilization Corporation 2010). This steady monetary flow, coupled with tax exemptions on revenues (Mortimer 2012) increased union finances, and in turn their coercive power over both the employer and employees.

Ontario’s labour law is encoded within the Labour Relations Act (1995), Section 47, which states in accordance with the Rand Formula:

... where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union, forthwith (Service Ontario 1995).

The labour movement followed a similar trajectory in the United States. As in the Canadian case, trade unions in the United States rapidly increased in power, leading to the implementation of the Taft-Hartley Act in 1947 to curb unrealistic union demands. The Taft-Hartley Act banned closed shops, making the practice of hiring only unionized workers illegal. Meanwhile, the act allowed states to ratify their own labour laws, leading to the adoption of RTW laws by 23 states. RTW laws prohibit the deduction of mandatory union dues from worker’s wages, although workers are still permitted to unionize or join an existing union if they so choose (Schiavone 2008:12).

Based on the proliferation of RTW laws in the United States, similar legislation is being proposed in Canada. This trend was initiated in Alberta, where the Wildrose Alliance Party proposed RTW legislation as a means of “allowing workers the choice to determine their membership in labour organizations” (Wildrose Alliance Party 2010). Similar legislation was suggested by the Government of Saskatchewan and most recently by Progressive Conservative

leader Tim Hudak and Ontario PC Labour Critic Randy Hillier, in a PC Caucus White Paper titled *Paths to Prosperity: Flexible Labour Markets*. This White Paper proposes the implementation of RTW laws in Ontario, thereby giving workers a right to choose membership in the union, rather than being forced to pay compulsory dues as per the Rand Formula. This development will lead to a union more responsive to its members, while fostering a flexible work environment that will be significantly more attractive to investors, leading in turn to job creation (Ontario Progressive Conservative Party 2012).

Section Two: The Argument Against Right-to-Work (RTW) Legislation

The proposal to implement RTW legislation in Ontario has, perhaps unsurprisingly, been met with impassioned criticism, especially from the prominent Canadian Auto Workers union (CAW). Jim Stanford, an economist with the CAW, jabs at the implementation of RTW legislation in the United States, claiming that such legislation effectively destroys “majority unionism,” as the union cannot survive, let alone pursue its interests without the taxation of its members. Stanford argues that the Rand Formula is in fact a “compromise”, as workers can object to joining a union, but they are still required to pay dues. According to this logic, the automatic check-off of union dues is wholly democratic and has quelled volatile workplace relations. Stanford compares union taxation to government payroll deductions and income taxes, as the government and unions are similarly installed by majority vote, and thus should share in the power to tax their members. Stanford operates from the basis that if union taxes were voluntary, workers would no longer see any reason to pay as they would continue to reap the benefits of union activity (Stanford 2012).

The majority of anti-RTW advocates argue that this legislation aims foremost not to create employment opportunities, but to ultimately dismantle the union structure. The notion of a “free rider” is often purported, describing those who refuse to pay into the union, yet reap the

benefits of union activities. For instance, it is impossible for workers to decline the benefits of collective bargaining, as the entire workplace is affected. It is the issue of the “free rider” that evokes outrage amongst unionists, namely those who propagate the fictions of union lore, according to Morgan O. Reynolds (1984:236). The free rider then, on the premise of union myth, “seeks to reap where he has not sown, who wishes to enjoy benefits without burdens, protection without taxation, security without sacrifice, and rights without risks” (Reuther, Riffe, and Carey 1954:74).

According to Josh Mandryk (2012), a summer law student with the International Union of Operating Engineers, Local 793, RTW laws are a “race to the bottom.” As such, another claim held by unionists is that “RTW laws are low wage laws”, and this, according to Reuther et al. (1954:29) damages the economy as whole. Following the basic Keynesian principle that higher wages increase consumer spending, it is argued that low wages, as a byproduct of RTW laws, result in reduced consumption and failing businesses, both contributing ultimately to a cycle of economic decline.

Section Three: The Case in Favour of Right-to-Work (RTW) Legislation

The Union-Employer Power Dynamic: Realities

Often, anti-RTW sentiment operates upon false pretenses, as the realities of union versus employer influence are greatly obscured by propagandized convictions and outright fallacies. According to Reynolds (1984:57), union fiction argues that a dichotomy exists between the employees and employer, often played up as a Marxist battle between the oppressed and the oppressor. This notion acts to justify the realities of the unionist power dynamic, where workers act upon the idea that advances can only be made by threatening the livelihood of the business. In an effort to check capitalist power, the supply side, namely labour, has been monopolized by

unions to a great extent. For instance, Reynolds (1984:57) argues that the employer has no equivalent means of recourse in the case of a union strike. In a lockout situation, the employer does not restrict the worker from acquiring outside capital, whereas the worker withholds essential labour services from the employer as a means of coercion. Additionally, the employer should not be villainized as he merely acts as a “middle man” between consumers and the owners of capital. As such, Reynolds (1984:57) suggests that acting to harm an otherwise efficient employer who is successful at interpreting market forces to benefit the consumer, employee, and investors, “is the road to poverty, not prosperity.” In this view, unions in fact have a monopoly of power within the workplace, and thus exert a disproportionate, and unwarranted, coercive influence over the employees and employer.

In an attempt to justify this monopoly, the actualities of the free market system are often distorted. According to Reynolds (1984:59), it is often disregarded that the employer must pay competitive prices for all goods, including wages for labour services in order to attract both quantity and quality of workers, as workers in the free market system are by no means immobile. Large corporations and their utilities are inherently fixed, inevitably resulting in irresponsible and “opportunistic behaviour” by unionized labourers. The ramifications of opportunism are steep as investors act according to their own mobility to protect themselves from such market uncertainties. Without investors, industry cannot exist, and in this way thousands of potential jobs are lost through the exploitation of investor capital by manipulative labour unions (Reynolds 1984:61-62).

Another myth central to RTW law is the purported influence of so-called “free riders.” It is claimed that, if RTW legislation is implemented, this phenomenon will inevitably lead to the exploitation of unions as a common good. Yet there are a number of inherent faults concerning the notion of a “free rider.” Perhaps most importantly, the argument is framed in a way to assume that everyone will benefit from collective bargaining. This assumption fails to take into

account the damage caused by irresponsible union behavior, and thus by the same hand workers are also forced to suffer the detriments of collective bargaining. For example, one needs only to point to the closure of Caterpillar's Progress Rail Services unit in London, Ontario, to illustrate the detriments of rigid and irresponsible collective bargaining practices. Rusty Dunn, the company's spokesman stated in a press release: "the cost structure of the operation was not sustainable and efforts to negotiate a new, competitive collective agreement were not successful" (Keenan 2012). It is difficult to see just how anyone could "benefit" from a collective bargaining process that resulted in the loss of 450 jobs.

Also, it is important to note just how business-like unions have become in their own structures, and much like in any other business, union management acts to safeguard its own survival. It is important for such officials then to quell the idea of more effective and viable competition, so they may profit from providing union services, regardless of how inefficient they may be. In this way, legislation that forbids "free riding" in actuality serves to maintain a monopoly of union power, creating instead what Reynolds calls "forced riders" (1984:240). Such forced riding serves a protective function, since allowing workers to operate under non-union negotiated terms and conditions may result in differential wages that would undermine the unions' coercive power, assuming of course that the non-unionized workers are willing to work for less. Thus the notion of a "free rider" merely offers a convenient means to justify the taxation of all workers, as per the Rand Formula, as the only solution.

Right to Work (RTW) Legislation and Accountability

The dismantling of Ontario's unions may be an inevitable byproduct of RTW legislation, yet this should not necessarily warrant a cynical interpretation, as it would be a reflection of the worker's free will. Under RTW laws, there are two potential outcomes for a union that is no longer considered beneficial or legitimate, a) said union will naturally cease to exist due to a lack

of support (monetary or otherwise), or b) said union must act to legitimize itself in terms of accountability to the workers whom it is intended to represent. RTW legislation would then encourage a more responsive union arrangement by making illegal the practice of sustaining inefficient or unwanted unions through compulsory funding.

It is important to consider that the union structure functions from pseudo-democratic principles, as democratic principles are only applied so far as unions must be installed through a majority vote. It is often overlooked that unions lack an essential component of democracy: competition. The union operates within a one party system, and this lack of competition too often equates, as it does in the political realm, to no effective check on power.

In terms of legitimation in Ontario, important questions have been raised about the transparency of union dues, or lack thereof. To address this issue, Bill C-377 has been proposed by Conservative MP Russ Hiebert, urging that union financial statements be made public. According to Terence Oakey (2012), president of Merit Canada, if Bill C-377 is ratified, the earnings of top officials, financial statements, and information about lobbying and political pursuits will be disclosed. According to John Mortimer (2012), president of the Canadian LabourWatch Association, the logic behind this initiative is that unions differ from private enterprises, as workers, in the absence of RTW laws, are forced to invest in the union as a condition of employment. Canadian unions have an enormous amount of power, generating about 4.5 billion dollars in annual revenue, and it is no secret that much of this revenue is put towards political lobbying and campaigning. In a statement by the CAW: “The most important workplace lesson we have learned over the years was that, individually, the worker is in no position to challenge management. Collective action is absolutely fundamental to defend our interests and achieve our goals. The same lesson is true politically” (Canadian Auto Workers 2007).

Yet the issue remains as to whose “interests and goals” are truly being represented, as ordinarily the worker has no say as to which political causes will be financed with their union taxes. It comes as no surprise then that 83 percent of union workers are in favour of union transparency and agree that unions should disclose how they spend their dues (Kelly-Gagnon 2012). The Rand Formula may ensure security of the union from dissenting workers, but there is little being done to ensure the accountability of the union to the workers. It is becoming clear that in the absence of RTW legislation in Ontario there is no effective check on union power. Thus, much of the income generated from mandatory worker taxation is often used to fund the ideological pursuits of union leaders, a system hardly resembling the democratic enterprise that unionists purport their organizations to be.

Additionally, contrary to unionist conspiracies that claim RTW legislation aims foremost to dismantle Ontario’s unions, evidence suggests that similar RTW legislation in the U.S. has no direct impact on union density. Union density is lower in RTW states, at about 8 percent, as compared to states with compulsory unionism at about 20 percent (Davis and Huston 1995). Even so, these unionization rates likely reflect a pre-existing anti-union stance whereby workers no longer view unions as legitimate or viable. Similarly, it would appear as though Ontarians have become disillusioned with union affairs, as unionization rates have steadily declined from 1997-2011, and only 27.8 percent of employees belonged to a union in 2011—the second lowest unionization rate in Canada (Human Resources and Skills Development Canada 2012). Walter J. Wessels (1981) argues that RTW law gives workers an “exit vote” allowing them to opt out of heavy taxation imposed by unresponsive or self-interested union management. Importantly, Wessels found that job satisfaction was higher by about 10 percent in RTW states. This finding points to the forced legitimization of the union structure, or alternatively, its natural dissolution at the hands of increased individual autonomy, thereby resulting in more favourable working conditions.

Economic Effects of Right to Work (RTW) Legislation

The Ontario PC Caucus White Paper, *Paths to Prosperity- Flexible Labour Markets*, focuses heavily on reforming the outdated labour policies that are hampering economic growth, as Ontario can no longer adequately compete in an expanding global market. According to Hudak and Hillier (2012), it is for this reason that over 300,000 manufacturing jobs have been lost, and Ontario's unemployment rate has surpassed the Canadian average for the past five years.

The Government of Ontario's current approach of increased infrastructural spending has doubled the provincial debt and has done little to stimulate job growth in the private sector (Ontario Progressive Conservative Party 2012). Even more alarming perhaps was the government's decision to bail out General Motors for over 9.5 billion dollars, and Chrysler for over 2.9 billion dollars (CBC News 2010). According to *Maclean's* writer Andrew Coyne (2008), this fiscal spending is eerily reminiscent of NDP Premier Bob Rae's catastrophic attempt to "spend his way out of a recession," leading Ontario to the verge of bankruptcy. Coyne points to the fact that "the money the government spends has to be extracted from elsewhere in the economy, a process that rapidly unwinds any transitory gains in output. Either it is taxed, which obviously cancels out most of the "stimulus," or it is borrowed, leaving that much less for the private sector to borrow and invest" (Coyne 2008). Additionally, this Keynesian approach does little to address the root cause of Ontario's faltering manufacturing sector, namely its inability to compete, as inflated unionized wage demands have become wholly unsustainable.

As mentioned in the PC Caucus White Paper, RTW legislation has been implemented quite successfully in 23 American states, and according to the National Right to Work Committee (2012), RTW states have markedly surpassed states with compulsory unionism in both worker compensation (including wages and benefits), and employment rate. Over the past

decade, compensation for workers in RTW states has grown by 12.5 percent, double the national average of 6.4 percent, and almost four times greater than the average for states with compulsory unionism at only 3.1 percent. Nationally, employment in the United States has declined by 1.45 million jobs between 2001-2011; yet despite the economic downturn, employment in RTW states grew by 2.4 percent, 5.8 percent higher than states with compulsory unionism (National Right to Work Committee 2012).

Due to rigid labour laws, Ontario has not only been unsuccessful in keeping manufacturing jobs, but also in attracting new industries as entrepreneurs are reluctant to invest, for fear that their capital may be exploited at the hands of demanding unions. As the PC Caucus White Paper mentions, it is clear that companies are no longer willing to pay exorbitant and unsustainable unionized wages when they can produce their goods more efficiently elsewhere, namely in American RTW states (Ontario Progressive Conservative Party, 2012). This comes as no surprise when one considers that Canadian manufacturing workers make anywhere from 2.80-9.13 dollars more per hour than the average American worker, and wages can reach as high as 40 dollars, as compared to 17 dollars in the United States (McMahon 2012). It is clear that Ontario must take initiative to reform its labour policies through RTW legislation if there is any hope to compete effectively with the United States, especially considering the manufacturing trade deficit with the southern United States has grown from 1.8 billion dollars in 2002, to almost 10 billion dollars in 2011. Going back to the closure of the Caterpillar Locomotive plant in London, Ontario, as an example, the proposition of cutting 30 dollar-per-hour wages in half no longer seems unreasonable when one considers the surplus of labour the plant was met with when it relocated to Indiana (a RTW state), offering a starting wage of 12 dollars an hour (McMahon 2012).

It must be emphasized that businesses are responsible foremost to their shareholders, and thus intentions to turn a profit are not unreasonable and should not be misconstrued as

implementing “poverty level” working conditions. The propagandized notion of a “race to the bottom” is wholly inaccurate. What is occurring is rather a race to equilibrium within the free market, where workers are compensated sustainably for the value of their labour, in the absence of inflation. Thus, as the Canadian economy is opened up to participate competitively in the global market, Ontario labour laws should follow suit, granting workers the option to represent themselves more proficiently in the free market. No organization should have the power to force workers to accept only an inflated rate of compensation or prohibit workers from selling their labour at a fair market value. In the absence of RTW legislation, demanding and inflexible union structure has unfortunately robbed thousands of Ontarians of their jobs, as well as potential for new employment opportunities, and will only continue to do so.

Section Four: Summary

When the realities of the union-employer power dynamic are examined, it becomes clear that Ontario’s current labour laws grant unions the upper hand. The resulting opportunistic behavior by irresponsible labour unions is severely detrimental to the future of Ontario’s manufacturing sector, and to the economy as a whole. In the absence of RTW legislation, union management has no incentive to maintain accountability, leading to the funding of offhanded and often self-defeating ideological pursuits. Additionally, RTW labour laws have been proven to attract investment opportunities when installed in the United States. Ontario must follow suit with the implementation of similar legislation in order to compete with the powerful manufacturing sectors in American RTW states, and elsewhere in the global economy. The adoption of RTW legislation, as proposed by Ontario PC party leader Tim Hudak, is the essential reform Ontario’s manufacturing sector needs, as current practices are wholly unsustainable and an ill fit for effectively competing in the global marketplace of the 21st century.

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IDENTITY POLITICS

Race and Romance: Black-White Interracial Relationships since *Loving v. Virginia*

By Monica Kozycz

In 1967, a historic victory was reached by the United States Supreme Court (USSC) in the *Loving v. Virginia* case that decriminalized the existing anti-miscegenation laws in the country, effectively allowing individuals to freely marry across the colour line. *Loving* provided hope to America that the rigid racial boundaries that had been in place since the colonial era could finally be overcome to create a less racially divided country. That same year, the film *Guess Who's Coming to Dinner?* was also released, and it depicted a young white woman bringing her Black fiancé home to meet her conservative White family, much to their dismay. The film demonstrated that despite the formal judicial acceptance of interracial romantic relationships, civil society was not as eager to accept race-mixing, especially between Blacks and Whites. In this essay, I argue that despite the decriminalization of interracial marriage in *Loving*, strict racial boundaries continue to be enforced in the realms of marriage and sexuality that further disadvantage African-Americans. This occurs because of ongoing individual attitudes within the White and Black communities that discourage racial mixing, the over-arching class implications of Black-White relationships, the ongoing dominance of White norms and the low rates of Black-White intermarriage compared with those of Whites and other racialized minorities. I will begin by discussing the historic origins of anti-miscegenation laws in the United States and follow with a discussion of the contemporary implications and observations surrounding Black-White interracial marriage. Due to the limited scope of this paper, I will not discuss interracial intimacy beyond the realms of sexuality and marriage, thus avoiding the topic of multiracial children in interracial families, transracial adoption and the Multiracial Movement.

The first law in the United States that prohibited interracial sex and marriage between Blacks and Whites was enacted by the colony of Maryland as early as 1661. Between this year

and 1967, 41 of the 50 states enacted similar legislation banning sexual relations between members of differing races.¹⁵² Many of these laws were enacted as both slavery and immigration became institutionalized in the country. The primary motive behind such anti-miscegenation laws between Blacks and Whites was to protect the purity of the White race and ensure that Blacks, who were stereotyped as being less morally decent and inherently inferior in status and genetics to Whites, would not be able to taint the White race through procreation. As Rachel Moran notes: “by barring Blacks and Asians from marrying Whites, the laws ensured that these groups would have no access to white privilege through social contact and inheritance of family wealth.”¹⁵³ Moreover, the banning of interracial marriages was used as a tool to reinforce the rigid racial hierarchy that placed Whites in a position of superior power by ensuring that the races remained segregated even in the private sphere and by preventing the assimilation of Blacks into White society through intermarriage.

Furthermore, banning interracial marriage also reinforced the gender hierarchy during this period, when both Black and White women were seen as the property of men. For example, White women have historically been seen as “breeders of the race”¹⁵⁴ who are in need of the protection of White men. As such, any threat to white women’s sexuality is deemed a threat to the race as a whole. Thus, one purpose of anti-miscegenation laws was also to prevent defenseless White women from risking the demise of the White race by marrying and procreating with Black men. In fact, incidences in which Black men were reported to have had sexual relations with White women, often perpetuated through false claims of rape during the 19th and 20th centuries, often ended with groups of White men attacking or even lynching the accused Black perpetrator. At the same time, despite the official laws, many White men engaged

¹⁵²Thompson, Debra, “Racial Ideas and Gendered Intimacies: The Regulation of Interracial Relationships in North America,” *Social and Legal Studies* 18, no. 6 (2009): 354.

¹⁵³Moran, Rachel F, *Interracial Intimacy: The Regulation of Race of Romance*, (Chicago: University of Chicago Press, 2001): 4.

¹⁵⁴Perry, Barbara and Mike Sutton, “Policing the Colour Line: Violence Against those in Intimate Interracial Relationships,” *Race, Gender and Class* 15, no. 3 (2008): 243.

in sexual relations with Black women; these relations usually took the form of White plantation owners raping their Black slaves or keeping Blacks or Mulattoes as concubines.¹⁵⁵ This reality demonstrates the degree to which White men saw Black women as their property, which they could violate and use at their disposal with no repercussions. Conversely, Black men would pay with their lives at the mere suggestion of sexual contact with a White woman. Finally, whereas White women were viewed by White men as property that must be protected and kept within the race, Black women were seen as worthless property that could be violated, suggesting that, regardless of race, women during this period continued to live under the control of White men.

While most states repealed their anti-miscegenation laws prior to the *Loving* case in 1967, a number of Southern states continued to enforce legislation that banned intermarriage or sexual relations between Whites and racialized minorities, usually Blacks. Until 1967, such laws were not deemed unconstitutional due to the precedent set in 1883 by *Pace v. Alabama*, in which the USSC upheld that anti-miscegenation laws did not violate the Fourteenth Amendment that banned racial discrimination because both parties in the union, regardless of race, would be punished if they broke the law.¹⁵⁶ Nearly three hundred years after the first anti-miscegenation law was enacted, Mildred Loving, a woman of African and Native American descent and her White husband Richard Perry Loving challenged Virginia's *Racial Integrity Act of 1924* which banned marriages between any white and non-white persons, arguing that it did in fact violate the Fourteenth Amendment and personal freedom by dictating whom a person could marry.¹⁵⁷ The Supreme Court, led by Chief Justice Earl Warren, reached a unanimous decision in the case and declared that the *Racial Integrity Act* did violate the Due Process Clause and Equal Protections Clause of the Fourteenth Amendment and infringed on an individual's right to marry, stating:

¹⁵⁵ Moran, *Interracial Intimacy*, 26.

¹⁵⁶ Moran, *Interracial Intimacy*, 6.

¹⁵⁷ Moran, *Interracial Intimacy*, 95.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival.... To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.¹⁵⁸

Thus, thirteen years after the 'separate but equal' doctrine was officially repealed in *Brown v. Board of Education*, the court declared that prohibiting individuals to marry because of their race was unconstitutional. According to Ronald Sundstrom, *Loving* was met with reactions of "terror and salvation."¹⁵⁹ While many racialized minorities believed that interracial marriages were the key to dismantling White privilege through the "literal loving away of racism,"¹⁶⁰ others in the White community feared this possibility and the loss of White purity. Therefore, like many court decisions before it, *Loving* alone did not symbolize a general acceptance among Americans that interracial relationships were a positive trend.

Even thirty years after the *Loving* victory, both White and Black individuals continue to be reluctant to cross the colour line, and this trend continues to support a strong division between the Black and White communities. In 1997, Mary Waters of Harvard University found that "over 93 percent of whites and blacks choose same-race partners,"¹⁶¹ and as I will discuss later, this statistic is much higher than the percentage of other racialized minorities who choose to marry internally. Several scholars have conducted empirical research to investigate why this trend continues to persist. Based on a series of interviews and focus groups she conducted between 2000 and 2008, Erika Chito Childs argues that Whites display "supportive opposition"

¹⁵⁸ Moran, *Interracial Intimacy*, 98.

¹⁵⁹ Sundstrom, Ronald R, *The Browning of America and the Evasion of Social Justice* (Albany: State University of New York Press, 2008), 94.

¹⁶⁰ Sundstorm, *The Browning of America*, 94

¹⁶¹ Moran, *Interracial Intimacy*, 6.

towards interracial relationships “where they claim they did not have a problem with interracial relationships but then actively expressed reasons why they, and those close to them, would not, could not, and should not be involved interracially.”¹⁶² For example, many of the White college students she interviewed expressed that though they did not oppose the existence interracial relationships, their families would be unsupportive of them dating a person of colour. In general, the students’ own decisions to not date interracially were explained as a result of not being attracted to Blacks and differences in culture, values, interests and upbringings.¹⁶³ This evidence echoes a similar study done by Charles Gallagher in which 86 percent of white respondents said that at least one family member would object to them having an interracial relationship.¹⁶⁴ Moreover, when asked why their families would not support them crossing the colour line when dating, students “discussed how others were concerned about how ‘society’ would respond to the issue of the children or the general difficulty of being with someone of a different race.”¹⁶⁵ Therefore, ongoing attitudes among Whites continue to suggest that they see themselves as fundamentally different than Blacks and that White propriety means that Whites should not be dating Blacks. This implies that interracial relationships continue to be seen as a sign of deviance within the White community; if Blacks were truly viewed as equals, it is likely that these trends would not persist. Therefore, White attitudes towards interracial relationships indicate the persistence of racism as feelings of White supremacy over Blacks continue to be affirmed.

Opposition to interracial relationships is not a phenomenon unique to the White community and many members of the Black community also argue that these relationships are

¹⁶² Chito Childs, Erica, “Listening to the Interracial Canary: Contemporary views on Interracial Relationships among Blacks and Whites,” *Fordham Law Review* 76, no. 6 (2008), 2778.

¹⁶³ Chito Childs, “Listening to the Interracial Canary,” 2776

¹⁶⁴ Gallagher, Charles A, “Redistricting: Expanding the Boundaries of Whiteness,” in *The Politics of Multiracialism: Challenging Racial Thinking* rev. ed., ed. Heather M. Dalmage (Albany: State University of New York Press, 2004), 69.

¹⁶⁵ Chito Childs, “Listening to the Interracial Canary,” 2777

not a positive trend. Chito Childs argues that, based on her research, the Black community also exhibits “oppositional support” towards interracial relationships because “while offering many reasons why they distrust and discourage interracial relationships, they also acknowledge loving and accepting many interracial couples among their families and friends.”¹⁶⁶ She explains that these feelings of opposition occur because dating White individuals is seen as “an effect of white domination and the internalization of prejudice and self-hatred...that makes them perceive whites as superior, and that by associating with whites they can elevate their position.”¹⁶⁷ These attitudes are primarily directed towards Black men who date White women, the most common Black-White relationship. In these situations, the Black men are often more successful and in pursuing a White mate they are seen as “selling out” or “turning their backs on their community.”¹⁶⁸ Furthermore, because White women have traditionally been used to represent physical beauty, it is suggested that these Black men are adhering to norms which benefit and idealize Whites. Additionally, when Black individuals marry outside their racialized community, Chito Childs argues that they are seen as abandoning racial solidarity, whereby Black men and women should support each other in order to strengthen the community and resistance to White norms.¹⁶⁹ Moreover, Chito Childs observes that many Blacks stated that they did not want their loved ones to marry White individuals because these loved ones would have to face the racism associated with trying to break into the White community.¹⁷⁰ Therefore, it is clear that Blacks continue to distrust Whites, and these sentiments are at the heart of opposition towards interracial marriages. Furthermore, despite the hope after *Loving*, interracial marriage is actually viewed as a threat to the Black community, rather than a way of fighting racism, because it reinforces White supremacy and dilutes Black solidarity. Thus, even without rigid anti-

¹⁶⁶ Chito Childs, “Listening to the Interracial Canary,” 2781.

¹⁶⁷ Chito Childs, “Listening to the Interracial Canary,” 2779.

¹⁶⁸ Chito Childs, “Listening to the Interracial Canary,” 2780.

¹⁶⁹ Chito Childs, “Listening to the Interracial Canary,” 2780.

¹⁷⁰ Chito Child, “Listening to the Interracial Canary,” 2779.

miscegenation laws in place, it is clear that Blacks and Whites remain divided in the private sphere. As a result, race-mixing occurs at low rates, and both races continue to see interracial relationships through a lens of terror rather than salvation.

Class is another prominent theme in the attitudes and representations surrounding interracial relationships. Chito Childs notes that, based on empirical research, individuals are most likely to engage in interracial relationships with members of the same class and socioeconomic standing. Thus, wealthy, well-educated Blacks will marry wealthy, well-educated Whites, while poor, less-educated Blacks will marry Whites who share these characteristics.¹⁷¹ Based on this evidence, Chito Childs concludes, “interracial marriage drains the most successful black individuals, particularly black men, out of the black community, taking their financial success with them.”¹⁷² This pattern consequently hurts the Black community economically and socially by removing it of economically successful role models, who leave to join the more advantaged White community. Moreover, this trend is perpetuated by various media and cultural products that show White individuals engaging in sexual relationships with Blacks only when these Blacks are exceptional in some way—usually meaning they are highly educated or wealthy.¹⁷³ In fact, this trend is even true in the aforementioned film, *Guess Who’s Coming to Dinner?*, in which the Black male fiancé is a wealthy and successful doctor. Thus, even though *Loving* may suggest that love is colour-blind, it is not blind to class. Interracial relationships can be seen as a symbol of class mobility, and Blacks are only worthy of Whites when they share a similar class status. When Blacks date White individuals, it is either because they themselves have elevated their own socioeconomic status or because their White mate has lowered theirs. Therefore, I suggest that overarching class

¹⁷¹ Chito Childs, Erica, “What’s Class Got to Do with It? Images and Discourses on Race and Class in Interracial Relationships,” in *Multiracial Americans and Social Class* rev. ed., ed. by Kathleen Odell Korgen (New York: Routledge, 2010), 22.

¹⁷² Chito Childs, “What’s Class Got to Do With it?” 24.

¹⁷³ Chito Childs, “What’s Class Got to Do With it?” 24.

differences continue to perpetuate strict racial inequalities and, in this sense, interracial marriage does little to break down barriers or cross boundaries.

Next, I argue that interracial marriage does not effectively support the eradication of racial discrimination and inequality because it is inherently founded upon White norms. One of the reasons why *Loving* was initially seen as a positive breakthrough was the fact that decriminalizing interracial marriage would lead to more biracial and multiracial children and thereby expand the networks of individuals beyond members of their own race. However, this notion rests on the implication that Blacks can only elevate their statuses in society when they mix with Whites, suggesting that Blacks are still dependent on Whites while the inverse is not true. Orlando Patterson has argued that out-marriage is most beneficial to Black individuals because it leads to the expansion of valuable networks of social capital, which helps Blacks to overcome segregation and allows for the exchange of “social dowries” between racialized communities.¹⁷⁴ Furthermore, this process of exchange is seen as a form of distributive justice, since the privileges and benefits that were once restricted to Whites can now be shared and transferred to Blacks.¹⁷⁵ However, a fundamental flaw in Patterson’s argument is its suggestion that Blacks must dilute their own race by mixing with Whites in order to truly be liberated from oppression. Sundstrom also disagrees with Patterson’s idealist interpretation of interracial relationships, arguing that it is flawed because it rests on the assumption that marriages are in fact a racially unifying process when in reality this is not true.¹⁷⁶ As illustrated above, both the Black and White communities are reluctant to embrace interracial relationships and they continue to exist within an economic and political framework that takes class and gender into consideration. Thus, interracial relationships are not in themselves an organic manifestation of love and acceptance between two races, and for this reason they cannot be seen as the key to

¹⁷⁴ Sundstorm, *The Browning of America*, 104.

¹⁷⁵ Sundstorm, *The Browning of America*, 105.

¹⁷⁶ Sundstorm, *The Browning of America*, 106.

transversing racial boundaries. Furthermore, interracial relationships may not achieve racial equality because they suggest that Blacks must marry outside of their race and abandon racial solidarity in order to achieve a sense of equality.

Perhaps the greatest potential threat towards the Black community that has come out of the *Loving* victory is the disparity between the amount of interracial marriages between Blacks and Whites and those between Whites and other racialized minorities. While relationships between Blacks and Whites have increased since the 1960s, they occur at a lower rate than marriages between Whites and Latino/as, Native Americans and Asian Americans.¹⁷⁷ For example, in the 1990 United States census, of the married female population, 31.4 percent of native born Latinas, 45 percent of Asian Americans and 54 percent of Native Americans had White husbands, whereas only 2.2 percent of married Black women had White husbands.¹⁷⁸ Similarly, only 5.6 percent of married Black men had White wives compared to 36 percent of native born Asian men, 32 percent of Latinos, and 53 percent of Native American men.¹⁷⁹ Therefore, it is clear that Whites are marrying Blacks at a much lower rate than members of other racialized minorities, likely due to the prejudice and distrust in both communities that have been discussed earlier. However, these statistics also lead to several disturbing trends. In his 1998 article in *New York Times Magazine*, Michael Lind argues that the low rates of intermarriage between Blacks and Whites suggest that Blacks continue to remain an isolated and segregated community compared to other racialized minorities.¹⁸⁰ Furthermore, as interracial couples continue to procreate and have mixed-race children, the general American population is becoming less White, but not more Black. Instead, a “white-Asian-Hispanic melting pot

¹⁷⁷ Walsh, Eileen T, “Ideology of the Multiracial Movement: Dismantling the Color Line and Disguising White Supremacy?” in *The Politics of Multiracialism: Challenging Racial Thinking* rev. ed., ed. Heather M. Dalmage, (Albany: State University of New York Press, 2004), 61.

¹⁷⁸ Walsh, “Ideology of the Multiracial Movement,” 61.

¹⁷⁹ Walsh, “Ideology of the Multiracial Movement,” 61.

¹⁸⁰ Lind, Micheal, “The Beige and the Black,” *New York Times Magazine*, August 19, 1998, p. 38, final edition.

majority” is emerging, which Lind refers to as “beige Americans”, while the Black minority is once again segregated and “left out of the melting pot.”¹⁸¹ Lind argues that this will create a new racial dichotomy in the United States that consists of all non-black, ‘beige’ Americans in a superior position to Blacks. Not only does this lead to the continuation of an oppressed Black minority that is consistently portrayed as inferior, but it also prevents coalitions from being built between Blacks and other racialized minority groups, since these minorities will effectively be assimilated into the top rungs of power. Thus, even if this increasingly mixed-race country leads to the perception of a post-racial society, where race is no longer an issue, Blacks will continue to be excluded from the benefits of White privilege, or in this case non-black privilege. Therefore, the strict racial boundaries that prevented political and social mobility prior to 1967 still exist in society, and high rates of mixing between non-black individuals may actually strengthen this divide.

The historical and contemporary analysis of interracial romantic relationships demonstrates a strong interplay between race, gender and class discourses. It must be noted that although the decriminalization of interracial sex and marriage has not led to the elimination of strict racial borders between Blacks and Whites, *Loving* still represents an important step in the Black struggle for equality because it symbolized the opening of the White family to non-white individuals. However, as I have shown, the legal acceptance of interracial romantic relations has not led to an increase in racial blending or greater equality since both Black and White individuals harbour negative views and attitudes towards the idea of interracial relationships; overarching class norms limit the ability of interracial marriage to unite separate communities; Black liberation through out-marriage is associated with an adherence to White dominance and norms; and the low rates of intermarriage between Blacks and Whites when compared to other racialized groups suggest that Blacks are becoming more segregated, which can hurt their own

¹⁸¹ Lind, “The Beige and the Black, 38.

political struggles and lead to further oppression from the non-black majority. Even though Black-White romantic unions can ideally be seen as the epitome of racial cooperation and coalition-building in the family sphere, they are still criticized and rare. Due to these facts, I conclude that interracial relationships and race mixing have not emerged as the divine solution to racial inequality in America and that racial boundaries and hierarchies remain rigid in the private realm, even when there is no official legislation to enforce them.

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MEDIA AND POLITICS

More of the Same: The Internet's Role in Political Campaigns

Steven Wright

Since the advent of the home computer and graphical browser, which allowed technological amateurs to surf the web, the Internet has been proclaimed a revolutionary medium that would forever change the nature of democracy and the political process by offering citizens a platform for collective deliberation and crowd-sourced policy formation. In this sense, the Internet would fulfill the tenets of Jurgen Habermas' ideal public sphere, in which all private citizens could come together in a literal or figurative social realm to collectively cultivate public opinion (1991, 102). However, as the last ten years of widespread Internet usage have shown, this prophecy has yet to be fulfilled. The Internet has affected the ways in which individuals communicate with one another and express themselves, but dramatic changes to citizen participation in the political realm are not yet apparent. The process of public opinion formation is especially important during political election campaigns, as these events arguably represent the only event in which citizens in a modern liberal democracy are able to explicitly exercise their democratic rights. As such, if the Internet were to have any substantial impact on political participation within a democracy, the effects would be especially apparent during election campaigns.

This paper argues that such considerable effects have not been seen. The impact that the Internet has had on political campaigns is not revolutionary insofar as it has not significantly increased the level of cross-ideological deliberation among citizens or integrated traditionally uninvolved citizens into meaningful political participation, although it provides the opportunity to do so. Rather, it is used as an effective tool for augmenting already-existing campaign tactics and strategies such as volunteer outreach, campaign organization, fundraising, and promotion. As such, the Internet has a much more dramatic effect on the supply side of political campaigns than the demand side. The first section of this paper focuses on the aspects of the Internet that are

at odds with public sphere ideals and its failure to incite deliberation and participation during an election. The second section deals with the ways in which the Internet is used to improve political campaigns and how it augments already existing campaign tactics. Although the Internet is still relatively young, and politicians' use of it is even younger, it has yet to fulfill its prophetic role as an engine for a citizen-lead, direct form of deliberative democracy.

A not so revolutionary medium

One of the most apparent issues that arises when considering the Internet's impact on political participation is the digital divide, which refers to the phenomenon in which certain peoples, typically disadvantaged and minority groups, are excluded from the Internet due to a lack of technological knowledge or economic resources that enable Internet use. An ideal public sphere is a space in which all members of society are given an opportunity to participate in discussion; as long as certain groups are excluded from this space, the public sphere and the implications for democracy that come with it can never be realized.

According to research conducted by Hermson et al. on campaign politics in state legislative elections, age and ethnicity are important factors in determining the level of Internet use in political campaign, with regards to both citizens and candidates. It is found that traditionally disadvantaged or technologically illiterate groups lag in their use of the Internet, and as a result, candidates are less likely to use the Internet in constituencies with a relatively high senior, African-American, and poverty-stricken population (2007, 34). To aggravate the situation further, their research shows that the digital divide takes place on the candidate side as well, as White candidates are more likely to use Internet campaigning techniques than African-American or Latino candidates (2007, 35). The digital divide is a significant obstacle for any group or cause that looks to use the Internet to be more effective, and election campaigns are no exception. The underlying inequalities that plague modern societies necessarily affect political

participation in liberal-democracies. The digital divide, in this sense, is a manifestation of this phenomenon in relation to the Internet and election campaigns.

The second hindrance to the ideal of democratic deliberation comes from the Internet's seemingly benevolent ability to let its users customize and choose exactly what they want to see and hear. A necessary aspect of a vibrant democracy is the exposure and discussion of different opinion through which a consensus can be formed. Whereas the television or newspaper exposed readers and viewers to a wide range of topics and opinions, a digital environment offers users the opportunity to see only what they want to see. In his book, *Republic.com*, Cass Sunstein asserts that new media's customizable nature has a fragmenting effect on citizens, and thus has a negative impact on citizens' ability to govern themselves (2001, 9). This phenomenon of selective exposure creates narrow-minded citizens; insofar as Internet users are bored or uninterested with regard to politics, then they will never be exposed to it. Similarly, if users do have political interests, their content will be filtered to only include partisan sources, leaving them unexposed to different views.

This phenomenon, enabled by new media, has implications for citizen engagement in electoral politics, as partisan users will only become more partisan, and uninterested voters will exclude themselves from political issues and discussion. Nie et al. find evidence to support this argument. According to their research, citizens that combine Internet usage with news viewing are more partisan, and Internet usage results in more polarized and less centrist political outlooks (2010, 430). Furthermore, as Valentino et al. find, partisan individuals are likely to access opposing views via the Internet in order to defend their political views (2009, 604). The findings of Valentino et al. only reinforce the fact that only individuals who are already interested in politics will use the Internet to access such information, and those politically active individuals are still partisan inasmuch as they only seek out dissenting opinion to defend their own partisan

viewpoints. Moreover, as Bimber and Davis affirm, visiting campaign websites does not have a significant effect on the political opinion of the partisan viewers who seek them out (2003, 128).

The highly partisan nature of online politics is also manifest in the most popular form of online expression and discussion: blogs. Blogs, as a way for any Internet user to express their opinion and share it with potentially millions of people, have been an essential pillar in the argument for Internet democracy. However, the popularity of blogs have been found to be highly concentrated, with a very small percentage of blog pages garnering a very high percentage of the readership, and a very large percentage of blogs garnering very low readership (Hindman 2009a, 113; Ferrel and Drezner 2008, 17). As a result, blogs and the Internet may provide a voice for users, but it does not proved the guaranteed opportunity to be heard.

Not only are blogs highly concentrated in a pyramid style structure, but the most popular political blogs in particular are highly partisan in nature. In their study of political blogs, their network topology, and content, Hargittai et al. find that liberal and conservative blogs are more likely to link to blogs that have similar ideological dispositions (2008, 69). These findings show that the process of selective exposure and filtering is especially apparent within political blogs, which, while having the potential to spark lively and pluralistic debate, only limit the opinions that are expressed and viewed. Again, the presence of a plurality of opinions and views is essential in a liberal democracy, especially during elections, because it engenders an informed and critical citizenry that can be confident in making an informed decision when voting.

Lastly, the Internet fails to bring about revolutionary changes in electoral politics inasmuch as it is working to maintain the inter-party status quo, which privileges larger parties over smaller ones. In theory, the low costs and lack of barriers to entry of the Internet means that smaller parties with fewer resources would have the opportunity to level the playing field with larger, more resource-rich parties by using the Internet as a cheap and effective campaign tool. The importance placed on the Internet's ability to provide smaller parties with the opportunity to

compete is highlighted by the finding that electoral success has a relationship with the quality of a campaign's website (Latimer 2008, 90). Accordingly, Gibson and Cantijoch find that smaller parties in Australia and the UK highly value their campaign websites (2012, 8).

However, smaller parties' campaign websites remain ineffective in their ability to level the playing field with larger parties. There is evidence to suggest that major party candidates have higher quality websites, despite the effort and relatively low barriers to entry the Internet provides (Latimer 2008, 88). Also, the fact that campaign websites are unlikely to change voter opinion (Bimber and Davis 2003, 130) means that smaller parties cannot effectively use campaign websites to pull voters away from the major parties. Lastly, findings by Bimber and Davis that assert that politically uninformed citizens are very unlikely to visit party websites—and even when they do, they easily forget doing so (2003, 131)—indicates that smaller parties' campaign websites would also be ineffective at winning votes that traditionally do not turn out for elections.

The Internet is not entirely powerless in terms of its ability to change traditional trends in electoral politics. Given the fact that the majority of Internet use comes from young people (Hermson et al 2007, 42), the presence of political information on the Internet can effectively engage youth, a traditionally politically-disengaged demographic, in the political process. Specifically, online political humor plays a role in generating interest among young people in political issues by framing them in a relatable and entertaining way. Baumgartner finds that exposure to political comics does not have an effect on candidate preference, but does have a positive effect on political participation. However, Baumgartner also admits that those who are more likely to seek out political humor may already be politically active, which supports the above arguments made against the revolutionary capacity of the Internet (2008, 756).

In sum, there are many factors of the Internet that work against its heralded potential to revolutionize the political process and electoral politics. Namely, the digital divide, the

phenomenon of selective exposure and the highly centralized and partisan nature of blogs, and the ineffectiveness of small parties to make successful use of campaign websites all play key roles in undermining the Internet's potential as a space for the public sphere to thrive and public opinion to be formed. By not effectively contributing to this process of public deliberation, the Internet does not significantly help citizens make informed voting choices during elections, which are the most crucial political events in modern Western liberal democracies.

Augmenting traditional campaign tactics

While the rise of the Internet has not resulted in a more deliberative, informed citizenry, it has dramatically improved the methods and tactics that political campaigns use to target specific volunteers and voters, coordinate their own camps, and fundraise during elections. Campaigns have taken advantage of network technologies and the cultural shift that has accompanied the rise of the Internet in several ways; the second section of this paper looks at the cases of Howard Dean and Barack Obama as an example of how political candidates are using the Internet to increase the efficiency and effectiveness of their political campaigns in terms of volunteer mobilization and coordination, targeting of voters, and fundraising.

There is an interdependent relationship between media and culture in terms of media's diverse ways of reflecting and promoting cultural values (Carey 1989, 13). Each new medium that enters a society either has a hand in bringing about, or has been brought about by, a shift in culture (Postman 1985, 56). The Internet's arrival has come with a shift in cultural tendencies that favor interactivity, expression, and knowledge as a part of social experience. As Steinhom notes, in 2008, Barack Obama took advantage of this cultural shift in order to promote and nourish his unique brand by acknowledging that communication on the Internet acts in a more organic, network-oriented way, unlike the top-down, one-way communication of television (2010, 140). Obama tapped into social networks, recruited volunteers and cultivated a grassroots

campaign, using the Internet to propel his status from relatively unknown candidate to international icon. His success in the election was enabled partly by the Internet and its ability to communicate and coordinate between individuals on an unprecedented level.

New media enabled by the Internet such as email- and video-conferencing are making campaigns much more efficient and effective by allowing instantaneous communication of crucial strategic information between campaign staff. Barack Obama's 2008 presidential campaign stands out among others as the one that took advantage of the Internet in this way through several different tactics. The Obama campaign used multivariate testing through commercial email to test the comparative effectiveness of seven thousand different messages in order to find out which message would be the most effective at recruiting supporters and volunteers (Turk 2012, 50). Before commercial email, this kind of precision and expedience in testing the effectiveness of campaign messages would be nearly impossible. The campaign also allowed volunteers and supporters to generate and print out their own canvassing maps for walking through their neighborhood to promote for the candidate, and also let supporters generate their own online phone banks so they could work at home. It is clear that online tools have made political campaigns more sophisticated and thus more effective.

Making communication between campaign staff and volunteers more efficient and effective have decentralized the organizational power of political campaigns; by communicating information about voters, strategies and campaign messages to volunteers and supporters on the ground, the power of the campaign is put into the hands of the people on the ground, who have a better sense of the nature of their communities and can thus maximize the effects that campaign messages have in their communities. Internet technology has put more power in the hands of volunteers on the ground and given them the ability to adapt campaign messages (Gibson 2012, 80).

Democratic candidates Howard Dean and Barack Obama used this tactic in their respective 2004 and 2008 campaigns with much success. Howard Dean's Meetup.com, while not an official campaign website, gave users access to organizational tools that were employed to mobilize grassroots support during the democratic primaries (Hindman 2008, 24). Similarly, Barack Obama used mybarakobama.com, or MyBo, to provide resources and information to supporters and encourage them to campaign themselves (Gibson 2012, 79). By spreading out organizational powers and responsibility in a decentralized division of labour, campaigns are not only more effective, but also give off the air of a grassroots, citizen-led campaign. It is clear that being able to efficiently communicate strategies and messages to volunteers has resulted in a more sophisticated and far-reaching campaign, which results in a feedback loop that provides the campaign with more effective supporters and volunteers.

It is one thing to be able to communicate vital information between campaign staff, but it is another to be able to collect such vital information. The Internet has created the opportunity for political campaigns to collect vast amounts of voter information from website databases. To do this, campaigns hire third-party marketing agencies to track Internet users' browsing search habits and online purchase histories in order to target voters more accurately. Singer and Duhigg reveal how both candidates in the American 2012 national election used third party advertisers to 'data mine' users online profiles (2012, A16). Security and privacy issues aside, these tactics are letting political campaigns target voters and analyze their behavior on an unprecedented level. Data mining stands as another example of how political campaigns are using Internet technologies to augment traditional tactics and be more efficient in their use of them.

Lastly, and perhaps most importantly, Internet campaigns have added another dimension to the capacity of campaigns to marshal resources and raise money. Jesse Unruh called money 'the mother's milk of politics' (Burris 2010, 247). Traditionally, the majority of campaign fundraising has come from wealthy individuals and Political Action Committees (PACs) that

contribute donations to political parties (Burriss 2010, 249). However, this trend seems to have been challenged by the Internet, which makes the process of contributing a small donation much easier. The Dean campaign of 2004 saw roughly \$20 million come from online contributors, and 68 percent of his total fundraising total came from donations of \$200 or less, a very high percentage compared to George Bush, whose total fundraising was made up of less than 11 percent of donors giving \$200 or less (Hindman 2008, 23; Boatright 2013, 15).

In 2008, Barack Obama used the Internet in a similar capacity to garner a large amount of smaller donations. He “encouraged supporters to set up their own fundraising pages and combine fundraising with both online and offline activism” (Boatright 2013, 14). While not as large as Dean’s 68 percent, roughly half of Barack Obama’s total fundraising efforts were made up online donations and small donations under \$200 (Nelson 2010, 96). While small donors have always played a role in election finance, the Internet has made it easier for ordinary citizens to donate, since they can contribute by simply going on their computers and clicking a mouse.

Both Obama and Dean have taken advantage of network technologies and the Internet to augment existing campaign tactics in order to reach more supporters, effectively communicate with staff and volunteers, and fundraise in a more decentralized way by garnering more donations from a large amount of small donors. While the use of Internet technologies to bolster existing tactics is not revolutionary, it represents a significant change in the way campaigns are operated and organized, and is likely to continue doing so in the future. At the time of writing (December 2012) a comprehensive study has yet to be done with regard to online campaign tactics in the 2012 federal election.

Conclusion

The first section of this paper presents the argument that the Internet has not brought about a platform wherein citizens enter into a participatory, deliberative space where public opinion can

be formed. In other words, the Internet has not fulfilled Habermas' idealization of the public sphere. This notion has not been realized for three reasons: a) there still exists a digital divide which excludes certain disadvantaged groups from using the Internet; b) the phenomenon of selective exposure, which is enabled by digital technology, allows citizens to be willfully ignorant of opinions that differ from their own, and; c) the Internet maintains the inter-party status-quo, which limits the plurality and variety of choices that citizens have in a liberal-democracy.

The second section of this paper asserts that political campaigns have used network and Internet technologies to augment and make more efficient existing campaign tactics and strategies. The political campaigns of Howard Dean and Barack Obama have used the Internet, and its accompanying cultural shift, particularly well in the respective 2004 and 2008 bids for nomination and presidential office. As far as specific tactics go, the Internet has effectively made the coordination efforts of political campaign more efficient, allowed candidates and their staff to reach out to supporters and maintain communication flow with them, created a way for parties to gather a wealth of valuable information about voters, and provided a means to garner large amounts of small donations from ordinary citizens.

In consideration of the arguments above, it can be seen that the major changes the Internet has brought about have occurred on the supply side of election campaigns and less on the demand side, which is to say that it has affected candidates trying to get their message out more than the citizens who are subject to this communication. The use of the Internet by political parties is still relatively young considering Howard Dean was the first candidate to use it very effectively. It is yet to be seen if the increased use of the Internet by political candidates has a significant effect on the ways in which citizens use it to deliberate or to become more informed about the political issues of the day. The assertions of this paper affirm that there are still many

obstacles to overcome in this respect. Moving forward, it will be interesting to see if the Internet is indeed used as a space for political deliberation, as it is still a relatively young medium.

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EXPRESSION GRAPHICS

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