

# Journal of Practical Ethics

 Volume 3, Number 2. December 2015 

# CONTENTS



Less Blame, Less Crime? <i>Neil Levy</i>	1
Common Morality Theory in Japanese and American Bioethics <i>Tom L. Beauchamp</i>	18
<i>Oxford Uehiro Prize in Practical Ethics Winning Essays:</i>	
Should we Prohibit Breast Implants? <i>Jessica Laimann</i>	37
How Should Vegans Live? <i>Xavier Cohen</i>	61

*Editors in Chief:*

Roger Crisp (University of Oxford)  
Julian Savulescu (University of Oxford)

*Managing Editor:*

Dominic Wilkinson (University of Oxford)

*Associate Editors:*

Thomas Douglas (University of Oxford)  
Guy Kahane (University of Oxford)  
Kei Hiruta (University of Oxford)

*Editorial Advisory Board:*

John Broome, Allen Buchanan, Tony Coady, Ryuichi Ida, Frances Kamm,  
Philip Pettit

*Editorial Assistant:*

Miriam Wood

The Journal of Practical Ethics is available online, free of charge, at:  
<http://jpe.ox.ac.uk>

*Editorial Policy*

The *Journal of Practical Ethics* is an invitation only, blind-peer-reviewed journal. It is entirely open access online, and print copies may be ordered at cost price via a print-on-demand service. Authors and reviewers are offered an honorarium for accepted articles. The journal aims to bring the best in academic moral and political philosophy, applied to practical matters, to a broader student or interested public audience. It seeks to promote informed, rational debate, and is not tied to any one particular viewpoint. The journal will present a range of views and conclusions within the analytic philosophy tradition. It is funded through the generous support of the *Uehiro Foundation in Ethics and Education*.

*Copyright*

The material in this journal is distributed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Unported licence. The full text of the licence is available at:

<http://creativecommons.org/licenses/by-nc-nd/3.0/legalcode>

© University of Oxford 2013 except as otherwise explicitly specified.

ISSN: 2051-655X



# Less Blame, Less Crime? The Practical Implications of Moral Responsibility Skepticism

NEIL LEVY

*Macquarie University*

## ABSTRACT

Most philosophers believe that wrongdoers sometimes deserve to be punished by long prison sentences. They also believe that such punishments are justified by their consequences: they deter crime and incapacitate potential offenders. In this article, I argue that both these claims are false. No one deserves to be punished, I argue, because our actions are shot through with direct or indirect luck. I also argue that there are good reasons to think that punishing fewer people and much less harshly will have better social consequences, at a reduced overall cost, than the long prison sentences that are usually seen as required for social protection.



In every nation, a great deal of state money is spent on the punishment of criminals. The bulk of this expenditure is on prisons. In the United States, federal, state and local governments spent an estimated U\$75 billion on corrections in 2008 (Schmitt, Warner & Gupta 2010). There were more than one and half million people imprisoned in the United States at the end of 2011, the great majority in state facilities (Carson and Sabol 2012). This is enormously costly: not only directly, in dollar terms, but also (perhaps especially) in its indirect effects. Around 40% of the prison population is black (though blacks make up less than 14% of the total population). One in three black men can be expected to go to prison in their lifetime; a higher percentage than go into higher education (Lyons & Pettit 2011). Upon release into the community, former inmates have significantly worse employment prospects than those who

have not been imprisoned. These facts have effects on majority black communities, in particular: they are implicated in childhood poverty, behavior problems and mental illnesses, and may help to constitute a criminogenic environment, perpetuating the problems (Lyons & Pettit 2011).

Of course the US criminal justice system is widely acknowledged to have distinctive problems all of its own. In other countries, a far smaller percentage of people are imprisoned, and imprisonment does not seem to be as racially biased as it appears to be in the US. Whereas the United States imprisons 756 people per 100,000 of its population, the median rate for Southern and Western European countries is a dramatically lower 95 (Walmsley 2009). Costs, direct and indirect, are correspondingly lower. Nevertheless, even in these cases, the costs—to the taxpayer (including the cost of foregone tax incomes), to families, communities, and the prisoners themselves—are very significant.

Imprisonment does not only have costs, of course: it has benefits too. These benefits accrue to many different groups of people. Punishment is typically justified, in very important part, by its role in deterring crime, and by the fact that it incapacitates individuals some of whom would go on to commit more crime were they not imprisoned. To the extent that deterrence and incapacitation are genuine, imprisonment therefore brings benefits to potential victims of crime. Imprisonment can also—in theory at any rate—benefit the person imprisoned him or herself. It might provide an opportunity for the treatment of drug addictions or mental illness, the acquisition of skills, and so on. In practice, actual prisons tend to make the kinds of problems that lead to crime worse, not better (to increase drug use and mental illness, and worsen life prospects, making crime relatively more attractive, and to cause the breakdown of communities, thereby indirectly contributing to high crimes rates), but in principle punishment could benefit the person punished; sometimes, prisons actually fulfill this function. Prisons also provide employment; the growth of the penal system in the US has made it an important contributor to economic activity.

The costs and benefits of punishment are directly relevant to whether it is justified. But most philosophers think that these questions are secondary when it comes to justifying punishment. What matters most, they claim, is whether the incarcerated *deserve* to be punished. If they do not, then the question whether punishment is justified becomes a question not merely of weighing up its costs and benefits, but also of comparing its costs and benefits to alternative methods of responding to crime. In this article, I will argue that punishment is not justified on the basis of desert, and

that therefore we should be assessing its costs and benefits relative to alternatives. I will suggest that less punitive responses to crime may in fact have benefits: to criminals, potential victims of crime, and society more generally. Rejecting the notion that people deserve to be punished opens our eyes to possibilities of responding to crime that will be more effective, cheaper and more humane.

### MORAL RESPONSIBILITY

People deserve to be treated better or worse because of the way they have acted (alone) only if they are morally responsible for their actions. Desert, at least with regard to actions and omissions, is backwards looking: someone deserves something (reward, praise, punishment, or what have you) just because of what they have done or failed to do in the past. Other kinds of justifications, that do not invoke moral responsibility, are forwards looking: they ask about the future consequences of distributing benefits and burdens. In asking whether people deserve to be punished for breaking the law, we ask whether they are morally responsible; whether they deserve to be treated better or worse on backwards-looking grounds alone.

Debates about moral responsibility have usually focused on whether the freedom required for responsibility is compatible with causal determinism. Some philosophers have argued that if the universe is deterministic—that is, roughly, if the physical facts plus the laws of nature determine a unique future, for every instant of the universe—than no one can be morally responsible. The classical argument for this conclusion turned on access to alternative possibilities: allegedly, if our actions are determined, we lack the power to act in more than one way, and we are therefore not responsible for our actions. More recent versions of the argument have turned on whether we are the source of our actions, in a certain sense, independent of worries about alternative possibilities. Compatibilists—philosophers who hold that causal determinism is compatible with freedom—say that we do not need access to alternatives in the ‘all in’ sense to be morally responsible: we need only to be responsive to good reasons and not to be coerced or compelled to act against our better judgment.

These debates, in the metaphysics of free will, deserve to be taken seriously. However I will not address them here. Instead, I will present independent arguments for the conclusion that agents are not morally responsible for their actions.

## LUCK AND MORAL RESPONSIBILITY

Libertarians in the philosophy of free will are philosophers who hold that free will is incompatible with causal determination of action—that if conditions sufficient for my behavior are always in place well before I act, I do not act freely—but who also hold that we have free will (note that this view is entirely independent of libertarianism as a view in political philosophy, which holds that the just state is one in which there is minimum interference with individual choice; it is quite possible to be a compatibilist about free will and a libertarian in political philosophy). According to most libertarians, we can choose between genuinely open alternative possibilities. Compatibilists have long accused libertarianism of being susceptible to an argument from luck. Absence of determinism does not increase our control over our actions, they argue: rather, it makes how we act subject to responsibility-undermining luck. If the universe is indeterministic, such that when I contemplate whether to perform a good action or a bad, there is some chance that an indeterministic event might cause me to choose the first and some chance that an indeterministic event might make me choose the second, then I do not control which I do (everything about me—my beliefs, desires, values, and so on—is consistent with me doing either). And that entails that how I choose is a matter of luck. Luck is incompatible with moral responsibility: if the only difference between two agents is the product of luck, then they can't deserve differential treatment (Mele 2006).

This argument against libertarianism is a powerful one. However, the problem of luck is by no means confined to libertarianism. Luck is ubiquitous in our lives: people are unlucky to fall ill or lose their jobs (which isn't to say, of course, that everyone who falls ill or loses their jobs is unlucky: if I am sacked for stealing office supplies, that's not just bad luck) and lucky to win the lottery or to narrowly escape an accident. Most physicists believe that the universe is indeterministic, but it is not because determinism is false that we are often lucky and unlucky (it remains an open question how frequently the kind of indeterminism the physicists maintain is true affects events of the kind that matter to us). An account of luck should therefore not suppose that indeterminism is required for luck.

In earlier work, I have defended a detailed account of luck (building on the work of Pritchard 2005 and Coffman 2007). Here I shall just give the outlines of the account. An event or state of affairs is lucky if it is chancy, significant and out of the control of the person who it is lucky for. To say it is *chancy* is to say something about



the probability of its occurrence. Roughly, the less probable an event, the luckier it is if it occurs (so winning the lottery is very lucky, but correctly guessing ‘heads’ when a coin is tossed is much less lucky). Just how improbable an event must be to count as lucky is sensitive to how significant it is to the person. If it doesn’t matter at all, then it is not lucky no matter how unlikely it is. If it matters a great deal, then it need not be all that unlikely to be lucky or unlucky (compare winning 50 cents by guessing heads, with surviving a single round of Russian roulette using a six-chambered revolver and one bullet: clearly the person who survives at Russian roulette is luckier than the person who wins 50c, even though surviving Russian roulette was rather more probable than winning 50c). Finally, the event must be out of the agent’s control to be lucky for her: if I am able to control whether an event occurs, its occurrence is not lucky for me.

This account gives us a way of judging when an event is lucky or not. If I am hit by a car in a situation in which being hit is very unlikely (say on the sidewalk of a quiet road), I may be very unlucky. But if I am hit by a car in a situation in which being hit by a car is rather likely (say I have fallen asleep in the middle of the highway) I am not unlucky. When Tiger Woods sinks a straightforward putt, he is not lucky, because his skill and control ensures that he sinks putts like that 99 times out of 100. If I were to sink that putt, I would be lucky because I rarely sink putts like that. In order to understand the significance of luck for human life, though, we need an account of luck that is able to explain effects beyond those it has (directly) on the events within a life.

In particular, we need to be able to account for what Thomas Nagel (1979) called *constitutive* luck: luck that helps to form people into the kinds of people they are. Some people seem to be the victim of terrible constitutive luck: they are born with disabilities that are incompatible with flourishing lives, for instance. Other people seem to be the beneficiaries of wonderful constitutive luck: they seem to be born talented, healthy and resilient. It is hard to model this kind of luck using the resources of the account of lucky events, because there are difficulties in making sense of how lucky an individual is to be born with a particular trait. However, it is easy enough to use the resources of the account of lucky events to construct an account of constitutive luck. Something is constitutively lucky for a person if it is significant for her, out of her control and it is relatively unlikely in the circumstances into which she is born. This account gives us a context-relative account of constitutive luck. For instance, if a person is born at a time in history when most people die at 40, she might be lucky

to be so endowed as to live to 50, whereas if she were born into a developed country today with an expected lifespan of 50, she would be unlucky.

The principle on which critics of libertarians rely when they argue that libertarianism makes actions unacceptably subject to luck is this: no one can be responsible for anything that is for them just a matter of luck. The best way to bring this home is to compare two agents. If the only difference between them is a matter of luck, then they can't deserve different treatment. Suppose that two marksmen are each shooting at a target. Each is equally skilled and has practiced equally hard. Each focuses all their attention on the target and fires. Marksman A's shot hits the centre of the target. Marksman B's bullet flies straight and true, but fails to hit the target because a bird flies into its path, deflecting it. In that case, we would not think that A deserves praise that is not due to B, because luck and luck alone explained the difference between them. I will argue that luck and luck alone explains the differences between agents who find themselves performing wrongful acts and those who don't.

First, consider the influence of lucky events on how people may find themselves acting badly or well. When we deliberate about what to do, it is often true that small things can make a decisive difference. For instance, it might be true that I would fail to let the person walking in front of me know that a \$20 bill has fallen out of his pocket if it occurred to me, at the right time, that he looks well-dressed enough not to need the money (or if it occurred to me that his shirt reminds me of someone I don't like, or if my recent stress and therefore sense that I deserve a break crossed my mind, or what have you; of course, none of these thoughts need be conscious for them to influence my behavior). Now, the occurrence or nonoccurrence of thoughts like these may be a matter of luck for me: they may be significant (since they help settle what I end up deciding), out of my control and relatively unlikely (in the right circumstances, odds of 50% may be sufficient for a thought to be lucky, so I may be lucky if it occurs to me *and* if it does not). In cases like this, which I claim are quite common, how I end up deciding and therefore acting may be a matter of responsibility-undermining luck.

To see how this kind of luck may undermine moral responsibility, let's work through an example. I see the \$20 bill fall from someone's pocket and quickly deliberate whether to alert him to his loss, before it is too late and he runs across the road. If an appropriate thought occurs to me, I alert him; if it does not, I do not. Suppose I do not: am I to blame? The only difference between me in the case in which I alert him and me in the case in which I do not is a difference due to luck. But as we have seen, two agents cannot deserve different treatment if the only difference between them is

due to luck. I can't deserve different treatment in one case than in the other, it seems; therefore I am not to blame if I keep the money (unless, bizarrely, I am *also* to blame in the case in which I return the money).

Cases like this one—cases in which an action has the moral character it has due to luck—are common. We often perform one kind of action rather than another because a chance thought happens to strike us at the right moment. The cause of that thought may often be a chance factor in our environment, often one of which we are not consciously aware. These features—a billboard, a snatch of conversation, or even the way the light glances off the window, triggering a (possibly unconscious) memory—serve to prime our behavior, in much the same kinds of ways in which the primes used in psychological experiments may cause us to act one way or another (priming occurs when information of which we are not conscious, or which has effects on us of which we are not conscious, makes other ideas more accessible to us and thereby alters our behavior). Sometimes, there will be no illuminating explanation of why a thought happened to occur (though there will be causal explanation, such an explanation may not really explain the occurrence in psychological terms). Given that there are some circumstances in which most of us are capable of performing laudable as well as somewhat shoddy actions, we are all sometimes vulnerable to this kind of responsibility-undermining luck.

However, there are also a wide variety of circumstances in which we are typically not vulnerable to this kind of luck. There may be no circumstances in which, constituted as I am, I am capable of murder were the right thought happen to strike me. In any case, with regard to very many murders it would be bizarre to excuse the murderer on the grounds that such a thought happened to strike him. A would-be murderer may find himself contemplating such a course of action because the right thought happens to strike him, but many murders require some degree of planning and therefore take time. A chance thought may set us down a path, but when we have time to reflect on what we are doing, the influence of such chance thoughts may be reduced, as we bring our stable beliefs and values to bear to its assessment, and as new, sometimes conflicting, thoughts occur to us. So while there are grounds for excusing some actions on the grounds that they are caused by responsibility-undermining luck of the kind outlines above, there are many other actions in which such grounds are lacking.

In such cases, agents are not vulnerable to luck in the kinds of considerations that happen to strike them because the necessary conditions for such vulnerabili-

ty are not satisfied. To be vulnerable to this kind of luck, a stray thought must be capable of making an important difference to how we act (perhaps by making an important difference to how we reason) and that occurs only when things are relatively finely balanced. That is, it is only when we are so constituted that actions with quite different and conflicting moral characters are compatible with our attitudes and values that luck makes a difference in this kind of way (note that it is not enough that things be so balanced that chance factors can make a difference to our behavior for us to be excused on these grounds—no one should be excused for murder because it is a matter of luck that they bludgeoned their victim to death, rather than stabbing them—the luck has to make a significant difference to the moral character of the action to serve as an excuse). Now, things are *not* finely balanced, in the right kind of way, when, and only when, agents are so constituted that their attitudes and values are resistant to this kind of chance influence. And that happens as a result of constitutive luck. In other words, the explanation for why agents are often resistant to one kind of luck is that they are subject to another kind of luck instead.

Consider the normally virtuous agent, going about her daily business. Perhaps someone is rude to her, or cuts her off in the car park. Perhaps, as a result, she experiences a flicker of irritation that causes her (perhaps unconsciously) to entertain the thought of punching the person in the nose. But she doesn't do it; she doesn't even allow herself to entertain the thought for more than a fleeting instant. The explanation of why she does not punch the offender, in circumstances in which someone else might, is that it is inconsistent with her values to do so; unless she was subject to extremely severe provocation, there is no coherent story in which those values could explain that kind of behavior. So she is resistant to this kind of responsibility-undermining luck. But *why* is she resistant? In other words, why does she have the values and temperament she has?

The explanation will cite her constitutive luck. Her genes may explain her relatively even temperament, which makes her resistant to provocation. Her upbringing was relatively stress free, thereby ensuring that she does not experience the kind of anxiety from which those with stressed infancies suffer, which dispose them to react more rapidly and less reflectfully to perceived threats. She has received a good enough education, including a moral education, through which her responses to people and situations were trained in such a manner that aggression is not an immediately accessible strategy for her. All these things are not things for which she is responsible. They are her good luck. Had she been born differently constituted, she

would not have had her even temperament. Had her environment been more stressful, her role models less virtuous, or had violence been rewarded in her social setting, she would have been disposed to react quite differently. She would have been vulnerable to passing thoughts: chance thoughts might have led to her behaving badly, or well. Or she might even have been resistant to such thoughts because she is too *bad* for such vulnerability. Her actual lack of vulnerability to luck in what thoughts occur to her is explained by luck in her constitution.

Philosophers have sometimes argued that constitutive luck does not undermine moral responsibility because normal agents take responsibility *for* their constitutive luck. Normal agents play an active role in shaping who they are and what their values are: they modify their initial values (those they have due to constitutive luck) or they endorse them. This claim—that agents play an active role in self-shaping—is certainly true. It is, however, false, that in so doing these agents escape the responsibility-undermining effects of constitutive luck.

When we shape ourselves, we do so in ways that either simply *express* the values and attitudes we have as a result of constitutive luck, or in ways that are vulnerable to luck in what thoughts happen to strike us and other chance events. We shape ourselves, but our self-shaping is no less subject to luck than is our initial constitution.

Consider our even-tempered, moderately virtuous, agent again. She may not have always been either even-tempered or moderately virtuous; she may be partially responsible for how she is now, in the causal sense of ‘responsible’ (that is, it may be true that how she is is partially the result of things she did). Perhaps she started out quite different and deliberately shaped her responses. But however she did it, the self-shaping was the product of luck, in one way or another. Suppose, first, that in shaping herself she acted as she took herself to have most reason to act. This might occur because she was already disposed to usually (though not always) respond in the kinds of ways in which she is (pretty much) always disposed to respond now, or because she is disposed to value the way in which she now responds. In that case, in shaping herself she was expressing her constitutive luck. She made choices that seemed (often enough) natural and obvious to her to make; as we saw above, when things are not evenly balanced—when choices seem natural and obvious—constitutive luck explains why our reasons for action have this kind of character. In this kind of case, she does not escape luck; rather, she expresses it.

Suppose, however, that shaping herself in this way did not seem so natural and obvious to her. Suppose that things were more finely balanced, so that she could just

as easily have ended up hardening herself to the needs of others. These are precisely the kinds of conditions in which luck in the considerations that occur to her may have a decisive effect (and luck in her environment, too: for instance, in who she encounters and befriends, and the moral outlooks they happen to have). In cases like this, *to the extent to which her self-shaping does not express her constitutive luck, it is the product of luck around the time of choice.*

Most cases of self-shaping will be mixed: we will express aspects of our constitutive luck but also respond in ways affected by lucky events around the time of choice in shaping ourselves. And the relative influence of the different kinds of luck may change over time: as we develop a more stable personality and outlook, our choices will likely come to seem more obvious and natural to us, and will be correspondingly less vulnerable to luck around the time of choice. But self-shaping does not allow us to escape the effects of luck; at best, it allows us to escape the effects of one kind of luck by ensuring that another kind plays a more prominent role. This is not surprising: if we are subject to luck in our choices prior to self-shaping, we are subject to luck *in* self-shaping, because the choices involved in self-shaping are, after all, just choices like any other.

If luck undermines moral responsibility—as I claim—self-shaping does not enable us to become morally responsible, because it is itself the product of (responsibility-undermining) luck. Luck is not a problem that can be solved. It must be avoided or dissolved if we are ever to hold anyone morally responsible.

## AVOIDING LUCK

There are a number of philosophers who might shrug their shoulders at the arguments presented above. They would deny that luck is a problem we need to solve. They accept that someone might be lucky or unlucky to have a good, or bad temperament, a good or bad education, or to find themselves in challenging circumstances—the kinds of circumstances in which ordinarily good people may easily find themselves condoning or even engaging in terrible actions; think of ordinary Germans in the 1930s, or ordinary Southerners in the United States prior to the civil rights movements. Nevertheless, they hold, these kinds of luck do not undermine responsibility. Someone might be unlucky to come from a deprived background, to have had bad role models and to have the kind of life prospects that make crime more tempting than it is for me (say), and yet be morally responsible for their crimes. Some philoso-

phers are unperturbed even by the fact that how we choose is often subject to chancy events occurring around the time of choice: they maintain we can be responsible for these lucky choices.

These philosophers defend a variety of views. For some, what matters is whether our actions genuinely express our attitudes (Smith 2005). For others, what matters is whether we respond to moral reasons in acting (Arpaly 2002). I do not intend to argue against these and other views that deny that luck undermines responsibility. Rather, I aim to establish something less demanding: that whatever plausibility they have is not sufficient to justify the more severe kinds of blame that responsibility is usually taken to underwrite. That is, none of these theories suffice to establish that agents are responsible enough, or responsible sufficiently beyond reasonable doubt, to justify sanctioning them; in particular, they can't justify the kinds of hard treatments typically involved in punishment.

First, I want to highlight some of the moral costs associated with accepting the view that we can justifiably sanction agents even when they are lucky, limiting myself to the kinds of cases which are commonly encountered (rather than being concerned, as philosophers often are, with all possible cases). In the actual world, I claim, many of the people we blame are the victims of a double dose of bad luck. First, they are unlucky to be badly off in various ways, and unlucky that being badly off in these ways disposes them toward crime. They may then be unlucky to actually commit a crime. This double dose of luck should give us pause before we conclude that these ordinary criminals deserve punishment.

We might illustrate this kind of claim by considering the kinds of criminals that routinely pass before our courts: car thieves, burglars, drug addicts, and so on. These people typically come from relatively deprived backgrounds, which explains several facts about them. It helps to explain why they find crime tempting (alternative strategies of securing income and respect are much less available to them than to us). It helps to explain why they are less likely to think crime is morally unacceptable (one is likely to be less horrified by crime if one's father or other respected older figures are criminals, or if going to prison is so common in your neighborhood that it carries little stigma). Deprivation can also cause cognitive and psychological problems that make crime more likely, either by reducing the capacity for self-control (Hackman & Farah 2009) or by reducing IQ and therefore reducing the capacity to understand potential consequences. In ordinary cases, criminals are disposed toward crime because they are—unluckily—badly off. Then they are blamed by those who are—luckily—well

off, for giving in to temptations we do not face, with meager resources to withstand them. It may be false that there but for the grace of God we go, but we have our luck, and not our merit, to thank for that.

Still, not every criminal is from a deprived background. White collar criminals are sometimes from privileged backgrounds; even drug addicts and burglars sometimes come from such social strata. These people do not seem to be the victims of a double dose of bad luck; rather, they are the beneficiaries of good luck, who have gone astray. Even in cases like this, I claim, a double dose of bad luck is to be found: there is some explanation of why they turned to crime, and that explanation will cite luck (bad company, losing a job, or a genetic predisposition, say). In any case, I do not mean these thoughts to be decisive. Some people will maintain that we can hold some or all of these people responsible despite their bad luck, and I have given them no argument that must force them to change their mind.

However, once we recognize what is at stake, these philosophers are no longer entitled to their complacency. Given that the argument from luck (and, indeed, other arguments designed to show that no one is morally responsible for their actions; Pereboom 2001; Waller 2011; Zimmerman 2011) is powerful, and given that the stakes are high, we ought to err on the side of refraining from sanctioning.

The stakes are high for an obvious reason: because sanctioning involves the imposition of suffering on those sanctioned. Deprivation of liberty is, for almost all people, a great burden. Add to this the kind of regimentation and disrespect that is normal in prisons and the costs of imprisonment to those imprisoned can be seen to be high. These features are intended to be part and parcel of punishment: it is to these conditions that judges sentence criminals, to deter them and others and (according to some theorists) to redress the moral balance by having them suffer in some kind of correspondence to the benefit they took in committing a crime. Actual prisons tend to be awful places, because they have features that are not part and parcel of the punishment but which often accompany punishment. Abuse of all kinds, both by other prisoners and sometimes by those in authority, is very common. Mental illness is often exacerbated by imprisonment. Drugs are widely available and prisoners seeking relief from boredom may find themselves addicted. Even after release the punishment may, in some sense, continue: the stigma of imprisonment dogs former inmates, ensuring that legal means of supporting themselves are more difficult to obtain.

Of course, the stakes are not always this high. Sometimes they are higher still (consider supermax prisons or capital punishment); sometimes they are lower (not



every prison is a hell hole, and there are a variety of alternatives to imprisonment, from community service to fines). The higher the stakes, the more powerful arguments for the compatibility of luck and responsibility must be, if sanctions are to be justified.

We should err on the side of thinking that sanctions are not justified, because sanctioning involves the imposition of harm, and there is a strong moral presumption against harming. That is, everyone agrees that we ought to refrain from harming other agents unless there are very good reasons not to refrain; thus, the imposition of harm is permissible only if a substantive burden of justification is successfully shouldered. Given the presumption against harm, sanctioning requires that the burden of proof be *decisively* on the side of harm; the bigger and the more irrevocable the harm, the better the justification must be (Vilhauer 2009). It is therefore not enough to show that it is not irrational to dismiss the luck argument; we can justify sanctions only if we can show that the argument really lacks force (all things considered). And no one, I claim, has been able to do that.

It might be objected that the presumption against harm is not as hard to overcome as suggested; it does not require, in particular, that we show that the luck argument lacks genuine force. We can overcome the presumption much more simply, by showing that the consequences of not harming are likely worse than the consequences of harming: we can invoke deterrence, incapacitation, and rehabilitation to justify sanctions. But that's the wrong *sort* of justification. What's at issue is whether people can *deserve* to be sanctioned, independent of the consequences. If we must resort to consequentialist grounds to justify sanctions, then it becomes an empirical issue whether punishment (say) can rightfully be imposed. It is fully compatible with the consequentialist approach, for instance, that the correct response to wrongdoers is to *reward* them, because that's what has the best consequences. Indeed, in certain cases that is not merely theoretically possible but even likely: it may be that the best response to some lawbreakers is to offer them opportunities for education, and even food and (decent) lodgings, not to punish them.

#### WHAT KINDS OF SANCTIONS REMAIN JUSTIFIED?

Still, the availability of some kind of consequentialist defense of sanctions leaves open the possibility that showing that sanctions are unjustified on the basis of desert makes no real difference to how we should act or to public policy. No matter

whether criminals are typically, even always, bad as a result of bad luck, some of them are indeed bad, and left to themselves they will make other people suffer through their actions. These people must be prevented from committing theft, assault, and worse crimes. Other criminals may not be really bad; nevertheless without the threat of sanctions, or simple incapacitation, they will make other people's lives worse, by stealing their car or their television, or by losing control and taking a swing at them. Showing that sanctions are unjustified does not begin to show that we can afford to close the prisons.

One response might be to make prisons much less harsh than they currently are. Indeed, given that prisons are breeding grounds for further crime and that violence and abuse are often rife in them, we have good reasons to do this. We should ensure that mental illness and addiction is treated in prison, not worsened. We ought to ensure that prisoners get educational opportunities to give them a chance of lawful employment when they get out. But it is natural to think that we can't go too far in the direction of making prisons secure, safe environments in which prisoners get the opportunity to make up for some of their past bad luck. The less harsh the prisons, the less the deterrent effect of the threat of imprisonment, so there are consequentialist grounds for thinking that prisons must be at least somewhat harsh. Indeed, some have worried that the logical conclusion of skepticism about moral responsibility is that prisons are made so pleasant that they come to be attractive, and people begin to commit crimes in order to get incarcerated (Smilansky 2011). They have also pointed out that making prisons less harsh might be costly, in pure financial terms: these costs weigh against that course of action.

Once we give up on the thought that sanctions can be deserved (or, more cautiously, that we are justified in imposing harsh sanctions), we can begin to weigh up the costs and benefits of imprisonment and rival responses to wrongdoing in consequentialist terms. It becomes an empirical matter how harsh prisons should be. The worries mentioned above notwithstanding, there are very good reasons to think that the optimal harshness is very much less than is typical today. In this final section, I will tentatively suggest that the optimal sanctions may, in some ways, be extremely light.

Though there is good evidence that deterrence works, at least for some kinds of crimes, there is also evidence that human beings are typically more responsive to positive incentives than to negative (Levy 2013). The threat of punishment does indeed have an effect on behavior, but that effect is smaller than the promise of

reward (and the two combined are more effective still). For this reason, we do better to offer criminals and potential criminals opportunities if they refrain from crime, perhaps coupled with the threat of punishment if they do not, then to focus on punishment alone. Genuine opportunities—training, jobs, treatment for mental illness and addiction—are likely to prove far more effective than mere threats. Moreover, such opportunities are much cheaper to provide, in the long run, since they have the potential to make the potential criminal a productive member of society, ensuring ongoing tax revenues and economic activity.

By coupling threats with opportunities, we can reasonably hope to reduce the number of people imprisoned, and therefore reduce the suffering endured by offenders (suffering which, we are assuming, is undeserved). We do so at the same time as we reduce economic costs and the number of crimes committed. There is also reason to think that when we must punish, we may be able to punish much less than we do now. Though threats have a genuine deterrent effect, this effect diminishes rapidly. Two years imprisonment is much less than twice as effective a deterrent as one year. The optimal amount of imprisonment time, measured by its deterrent value alone, may be startlingly low. Swift and certain punishment correlate far better with deterrence than does sentence length (Kleiman 2009). Further, shorter sentences actually increase certainty and therefore have a multiplying effect on deterrence: prisoners do not tend to appeal short sentences and courts have little patience for them when they do. As Kleiman (2009: 3) notes, in criminal justice systems like those prevailing in most developed countries, “severity is incompatible with swiftness and certainty”.

The criminological evidence is mixed and its interpretation difficult. However, there is no doubt at all that we can punish much less than we currently do, and achieve better results for all concerned (potential victims of crimes, tax payers, and offenders themselves). It may be that we can achieve these results with sentences that are months, and not years, long for most offenders. We should not pretend these solutions will reform all criminals. Some people will remain threats to innocent others, no matter how much we encourage them to change. Some psychopaths probably fall into this category, though some people believe that even psychopaths will refrain from harming others if other strategies prove rewarding. We may need to incapacitate some offenders for years or even decades. However, we may not need to punish them: though they are deprived of their liberty (at some cost to them, of course) they may be compensated in various ways. A lot depends on how many people fall into this class of offender (in a more just society, in which resources are better distributed, there

will probably be fewer people who experience the kinds of environments that lead to being irredeemably bad; there is evidence that many people genetically disposed to violence will not develop aggressive tendencies without exposure to abuse (Caspi et al. 2002)). If numbers are low, then we can afford to ensure that conditions for those who must be incapacitated compensate them for deprivation of their liberty.

In a more just society, worries about making imprisonment so lenient it becomes positively attractive also diminish. How attractive decent food and lodgings are depend on available alternatives: if one is sleeping rough, then the disincentive represented by the deprivation of liberty dwindles in importance. This worry can also be significantly mitigated by the fact that for non-psychopathic offenders, sanctions may be rather unpleasant, though also quite brief (Kleiman (2009: 94) suggests that a 40 hour stint in solitary confinement without radio or television might be aversive enough to have a high deterrent value for a juvenile offender; of course, one would want to be sure that these benefits did not come at the cost of offenders' mental health). It might be that a diagnosis of psychopathy—for which there are good tests—is required to avoid the harsher sanctions, ensuring that imprisonment retains its deterrent value for those (and only for those) that can be deterred.

If no one deserves punishment, the way is open for us to explore which sanctions can best promote the goals we aim to achieve. Though the evidence remains inconclusive, it may be that if we give up on thinking that people must be punished in proportion to their offenses, we can greatly reduce prison populations and sentence lengths, thus saving a large proportion of the money we currently expend on the corrections system. We can do this while reducing crime and its impacts on victims, and reducing the suffering of offenders and potential offenders. We may not be able to achieve all these goals except in a society that is already just, but moving toward these goals may constitute a step toward such a society.

*Acknowledgements: I would like to thank two anonymous referees for the Journal of Practical Ethics. This work is supported by a generous grant from the Australian Research Council.*

## REFERENCES

- Arpaly, N. 2002. *Unprincipled Virtue*. New York: Oxford University Press.

- Carson, E.A. & Sabol, W. J. 2012. *Prisoners in 2011*. Bureau of Justice Statistics. <http://bjs.ojp.usdoj.gov/content/pub/pdf/pr11.pdf>
- Caspi A., McClay J., Moffitt T.E., Mill J., Martin J., Craig I.W., Taylor A. & Poulton R. 2002. Role of genotype in the cycle of violence in maltreated children. *Science* 297 (5582): 851-4.
- Coffman, E.J. 2007. Thinking about Luck. *Synthese* 158: 385-398.
- Hackman, D. A. and Farah, M. J. 2009. Socioeconomic Status and the Developing Brain. *Trends in Cognitive Science* 13: 65-73.
- Kleiman, M. 2009. *When Brute Force Fails*. Princeton: Princeton University Press.
- Levy, N. 2013. Punishing the Addict: Reflections on Gene Heyman. In Thomas Nadelhoffer (ed). *The Future of Punishment*. Oxford University Press, pp. 233-245.
- Lyons, C.J. & Pettit, B. 2011. Compounded Disadvantage: Race, Incarceration, and Wage Growth. *Social Problems* 58: 257-280.
- Mele, A. 2006. *Free Will and Luck*. Oxford: Oxford University Press.
- Nagel, T. 1979. Moral Luck. In *Mortal Questions*, New York: Cambridge University Press, pp. 24-38.
- Pereboom, Derk. 2001. *Living Without Free Will*. Cambridge: Cambridge University Press.
- Pritchard, D. 2005. *Epistemic Luck*. Oxford: Oxford University Press.
- Schmitt, J., Warner, K. & Gupta, S. 2010. *The High Budgetary Cost of Incarceration*. Centre for Economic and Policy Research. <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.
- Smilansky, S. 2011. Hard Determinism and Punishment: A Practical Reductio. *Law and Philosophy* 30: 353-367.
- Smith, A. M. 2005. Responsibility for Attitudes: Activity and Passivity in Mental Life. *Ethics* 115: 236-271.
- Vilhauer, B. 2009. Free Will and Reasonable Doubt. *American Philosophical Quarterly* 46:131-140.
- Waller, B.N. 2011. *Against Moral Responsibility*. Cambridge, Mass.: The MIT Press.
- Walmsley, R. 2009. World Prison Population List (eighth edition). *International Centre for Prison Studies*. [http://www.prisonstudies.org/info/downloads/wppl-8th\\_41.pdf](http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf).
- Zimmerman, M. J. 2011. *The Immorality of Punishment*. Peterborough, Ontario: Broadview Press

# Common Morality, Human Rights, and Multiculturalism in Japanese and American Bioethics

TOM L. BEAUCHAMP

*Georgetown University*

## ABSTRACT

To address some questions in global biomedical ethics, three problems about cultural moral differences and alleged differences in Eastern and Western cultures are addressed: The first is whether the East has fundamentally different moral traditions from those in the West. Concentrating on Japan and the United States, it is argued that theses of profound and fundamental East-West differences are dubious because of many forms of shared morality. The second is whether human rights theory is a Western invention with no firm traditions in Eastern moral traditions. It is argued that this thesis is unsupported both historically and in contemporary bioethics. The third problem is whether multiculturalist theory casts doubt on claims of universal principles and rights. It is argued that the reverse is true: multiculturalism is a universalistic theory. The argument throughout supports common morality theory.



Global ethics is a currently fashionable notion, but its meaning and scope remain underdeveloped. To address some questions about universal standards in biomedical ethics, I will investigate three problems about alleged cultural moral differences, concentrating on presumed differences in Eastern and Western cultures. The first problem is whether there is merit in the thesis that the East—that is, Asia—has fundamentally different moral traditions from those in the West—that is, Europe and the Americas. I will argue, concentrating on Japan and the United States, that the thesis of *profound* and *fundamental* East-West differences is dubious in light of our many

cultural similarities and forms of shared morality. The second problem is whether human rights should be understood as a Western invention with no firm traditions in Eastern moral and political theory. I will argue that this thesis is unsupported in contemporary bioethics. The third problem is whether the existence of multicultural societies and pluralism of moral viewpoint support the claim that there is no universal morality. I will argue that this claim too is unconvincing.

### ALLEGED DIFFERENCES BETWEEN EASTERN AND WESTERN MORAL VALUES

I begin with a quote from an article published in 1987 in the *Hastings Center Report*—an article I have long admired. It was written by Professors Koichi Bai, Yasuko Shirai, and Michiko Ishii, who presented the following thesis:

*We must beware of drawing general conclusions as to “Japanese” characteristics on [bioethical] issues. We ought not to assume too readily a uniformity in Japanese culture; nor, needless to say, can we ignore Japanese peculiarity. The key is to observe the situation as it exists.... [I]t is difficult to generalize about the attitude of the Japanese people [on bioethical issues]. Taken collectively, the numerous opinions do not suggest any uniform perspective. Japanese attitudes have not been examined closely because of misinformation and lack of research.*

These authors argue, based on the empirical data available to them at the time, that there is a “lack of consensus among the Japanese on the acceptability” of conclusions about relatively new issues in bioethics. They say that this situation creates both “a tension and a link between traditional belief and contemporary practice” (pp. S18-S20).[1, see also 2].

I had read this article prior to a Conference in Japan in the 1990s that Professor Bai and I both attended. I told him then that I had been struggling to understand what I had been told by a number of people from Japan *about* Japan. What they had reported as Japanese moral views in conflict with American views is also widely found in bioethics literature. I was at the time reading the available empirical studies of Japanese practices and beliefs that had been published, especially the studies that compared Japanese beliefs and practices with American beliefs and practices. I asked Professor Bai, “Can you clarify for me how to think about the numerous reports in

the literature that Japanese families and physicians are paternalistic, family-oriented, and opposed to principles in Western ethics such as respect for autonomy, informed consent, and the like.” I told him that my problem was that much of what is reported to be Japanese beliefs and practices did not seem supported by the empirical literature on Japanese beliefs and practices. I could find only fragments of support in the empirical literature, which simply failed to show that Japanese physicians, nurses, and patients are morally at odds with American physicians, nurses, and patients.

Professor Bai had had his eyes locked on his tea cup as I asked my question. In giving a response, he shifted his gaze from the tea cup and fixed his eyes on mine. He said, “Professor Beauchamp, the Japanese people will tell you many things about the Japanese people, but look and see.” He had given an answer to my question in one astute sentence. I knew immediately what he meant, and it struck me that it applies just as well to the United States. Whether one starts with cultural stories and traditional beliefs in the United States, or Japan, or anywhere else, one has to look and see what the beliefs and practices are before one is entitled to claim a specific viewpoint.

I will start by looking and seeing what the situation is today in literature that studies beliefs, and to some extent practices, in Japan and in North America—and how we should assess similarities and differences in these beliefs. I will also assess an entrenched perspective on cultural differences that I label “the received view.”

### THE RECEIVED VIEW

*The received view* is about morally relevant cultural differences between Japan and the United States. It asserts that Eastern cultures are paternalistic and family-oriented in their moral beliefs and practices, with great deference given to physicians, whereas American and European cultures are nonpaternalistic and anti-authoritarian in their treatment of patients and families. Traditional family values in Japanese society are said to feed this custom: Individuals are expected to be relatively constrained and unassertive, remaining sensitive to the maintenance of fluent relationships that avoid confrontation and self-assertive conduct. This behavior and these cultural expectations are said to contrast sharply with Western emphases on individual rights and individual choice, which, according to the received view, are not admired in Japanese culture. As Professor Rihito Kimura once put it, “Autonomy, an important bioethical principle in the Western social context, is out of keeping with the Japanese cultural tradition” (p. 23).[3, see similarly 4].



In my arguments against this view, I do not deny that there are some differences *in degree* between American and Japanese societies on these matters, just as there are between American and European cultures, where the latter have been said to display more support for principles of solidarity and dignity even to the point of making those values more important in Europe than respect for autonomy and justice. Empirical studies show both modest differences between these cultures, while also showing disagreements within each culture when variables such as differences in time and age are taken into consideration. However, the thesis of basic moral differences *in kind*—as if people from the East and the West have fundamentally different moral principles, beliefs, practices, and conventions in medical institutions—is not empirically supported. Where others have looked for cultural *differences*, I will emphasize relevant cultural *similarities*. My claim is that the available evidence indicates that moral viewpoints in these cultures converge to agreement on basic moral norms and evaluations of moral character, not disagreement.

#### INFORMED CONSENT: HISTORY, TRADITION, AND LEGEND

I will use the doctrine of informed consent as my principal example of alleged differences that turn out not to be so different in Eastern and Western cultures. This doctrine was for many years, especially in the literature of the 1980s and 1990s, presented as a peculiarly American practice and as a notion poorly suited for an Eastern ethics of relationship in communities and family decision making. It was then, and is still today, closely linked in bioethics literature to supposedly distinctive American views of autonomy and individualism. As a paradigmatic example of this view, consider a September 2011 article by Professor John-Stewart Gordon of the University of Cologne, Germany, who states that, “non-western countries such as China, Japan, and most African countries do not share the idea of individual informed consent in biomedical ethics. Instead, they generally demand that either family—or community—informed consent should be obtained in cases such as life-threatening diseases” (p. 261).[5]

The view that informed consent is an outgrowth from a history of American individualism is a strange historical thesis. The term “informed consent” emerged only in the 1950s, and discussions of the concept as we know it today in the U.S. began only around 1972. It had no significant prior history in philosophy, law, medicine, or public policy in the U. S.[6] The histories of patient-physician interactions in

medicine in Europe and the United States prior to the 1970s are at root paternalistic and antithetical to informed consent. The history is one of tight physician control of information and patient deference to physicians.[7]

In an empirical study in the U. S. published in 1970, 50% of the physicians surveyed thought it *medically* proper, and 30% thought it *ethically* proper, for a physician to perform a mastectomy with no authorization from the patient other than her signature on a blanket consent form required for hospital admission; half of these physicians thought that it is ethically appropriate for a physician not to tell a cancer patient that she has been enrolled in a double-blind clinical trial of an experimental anti-cancer drug and is currently receiving a placebo.[8, 9, 10, 11] Only during the years between 1972 and 1980 did a major shift occur favorable to the view that physicians have a moral and legal duty to obtain an informed consent from patients for many procedures.

Accordingly, I do not accept the received view's claim that American tradition is non-paternalistic, whereas Japanese traditions are deferential to physicians and rest on a paternalistic model of medicine. European and American traditions of medical ethics derive from centuries of physician paternalism and cultural deference. American interest in patients' rights and paternalism is a phenomenon largely of the last thirty-five years of American history.

#### EMPIRICAL STUDIES OF JAPANESE BELIEFS ABOUT INFORMED CONSENT

Is the situation significantly different today in Japan, by contrast to the U. S., either as a matter of cultural attitude or medical practice? There are differences, but my working hypothesis is that today no profound cultural differences in consent practices exist between Japan and the U.S. To assess the current situation, I will consider the findings of several empirical studies about paternalism and informed consent that have been conducted in Japan about the opinions of Japanese physicians, nurses, patients, and families. Over three dozen such studies have been conducted in Japan since the early 1980s. I will mention only a representative sample conducted or reported over the course of 20 years from 1986 to 2006. These studies reach similar, though not identical, conclusions. I know of no scholarly study that contains significantly different findings than those I will mention.

The first study was reported by Professor Hiroyuki Hattori and five associates,

published in 1991, having been conducted in 1986-87. The data in this study show some striking similarities of attitude and behavior to earlier empirical studies of American physicians.[12] This questionnaire survey reached the following conclusions: Japanese physicians are willing to give their patients information adequate to obtain an informed consent, but many physicians retain discretion to judge how much information should be provided. In every category tested, over 50% of Japanese physicians stated that they morally *should* make adequate disclosures and receive an informed consent. One interesting response came in answering the question, "How do you explain high-risk diagnostic procedures to the patient?" Across medical students and physicians in university and other hospitals in Japan a consistent result appeared of from 56% to 60% who give the answer, "We explain the incidence and the severity of the risk, and if the patient seems to be bewildered by the information, we explain them to the relatives" (p. 1013).[12] These results are largely consistent with various studies of the behavior of American physicians.

A second study, conducted in 1989 by Professor Yutaka Mizushima and eight associates. This study examined disclosures of a diagnosis of cancer (in Toyama Prefecture), and asked the opinion of physicians, para-medical personnel, and lay persons about Japanese practices of nondisclosure.[13] One goal of the study was to critically examine the widespread belief that, "In Japan, more than 90% of medical doctors hide the actual diagnosis of cancer from patients. On the contrary, in the United States of America, . . . more than 90% of MDs reveal the diagnosis of cancer to their patients." The Mizushima study brought to light a very different picture of Japan than the 90%/90% hypothesis suggested. In response to the question, "Do you think we *should* reveal the diagnosis of cancer to patients who have requested it?", 69.2% answered "yes," 12.7% indicated they were not sure, and only 17.7% answered "no." Similarly, to the question, "Would you wish to be told the diagnosis of cancer if you had cancer?", only 13.2% of these physicians answered "no." This rate of "nos" is not surprising in light of another Japanese study that had shown nondisclosures and deception to have been steadily declining in Japan throughout the 1980s.[14] They declined still further in the 1990s.

In a third study, in 1995, Atsushi Asai and associates published a questionnaire study about terminally ill patients that was administered to both Japanese and Japanese-American physicians. The most intriguing feature of this study is that significantly fewer Japanese physicians would want for themselves the very same interventions that they recommend to their patients. For example, 74% would recommend

blood transfusions for gastrointestinal bleeding to their patients, but only 29% would want these transfusions for themselves.[15]

Fourth, a 1997 qualitative study, again by Asai and associates, used focus groups. [16] A number of physicians reported that they regularly disclose a diagnosis of cancer to a patient and also give an accurate prognosis and explanation of the effectiveness of available treatments. Many physicians reported that they make recommendations to patients about life-sustaining interventions, which the patients are free to reject. The study showed a considerable diversity of opinion among Japanese physicians about disclosure, about making decisions together with patients, about whether to always respect and follow a patient's decision, about withdrawing life-support once started, and about obligations generated by advance directives. As I read this study, the reports of these physicians show deep similarities at the time between U. S. and Japanese physicians in their beliefs and practices.

A fifth study is a 2005 questionnaire study on the subject of "negotiating end-of-life decision making" for incurably ill patients with metastatic gastric cancer, conducted by Baback Gabbay, Shinji Matsumura, et al.[17] This comparative study of resident physicians in both Japan and the United States was conducted at two U. S. sites and five Japanese sites. The widest variation these researchers found is that 94% of Japanese residents try to include both the patient *and* the family when disclosing the diagnosis and prognosis, whereas only about 54% of American residents routinely include the family. Also, Japanese residents generally prefer discussions with the family *first*, and Japanese residents reported in much higher numbers (76%) than Americans (18%), that they had sometimes *deceived* patients at the request of families.

These findings might seem to support the received view of a significant cultural difference in the family's role. However, a strong cultural-difference interpretation of this study would be a mistake. First, the fact that 54% of American physicians follow the apparent Japanese cultural pattern of including the family hardly shows that Japanese are family-oriented whereas Americans are autonomy-oriented. Although a much higher percentage of Japanese physicians reported deceiving their patients at the families' requests, a large number of Japanese physicians in this study expressed serious remorse, guilt, and moral uncertainty about their own moral judgments and behaviors when asked their ethical assessment of their deceptive conduct. Only 5% to 8% of Japanese medical residents were confident that their approaches to disclosure were the best way to handle the situation. Put another way, 92% to 95% of these Japanese physicians expressed some level of uncertainty about their moral duties of

disclosure. 45% of Japanese residents and 61% of American residents reported that they felt guilty either “all of the time” or “most of the time” when concealing a diagnosis. Both American and Japanese physicians, in comparable numbers, reported high levels of uncertainty about the proper ethics of the disclosure situations in which they find themselves.

In the end, the single biggest difference between Japanese medical residents and American medical residents, based on this study, is that 44% of Japanese residents would prefer to disclose a diagnosis of cancer to the family first, whereas only 2% of American residents would prefer that practice. Although this difference may seem large, *only* 44% of Japanese residents prefer this approach, well short of a majority, and this 44% figure goes down to 23% when the disclosure to the family is of *both* a diagnosis *and* a prognosis. At this point we see only a relatively small difference between the practices in Japan and the U.S. Gabbay, Matsumura, et al, in addition, point out that several studies conducted in Japan indicate that Japanese cancer patients are now directly expressing to their physicians a desire for disclosure, even though their families often do not express the same desire.

These investigators cite approvingly a sixth study by N. Horikawa, et al about how rapid the changes have been in Japan regarding the disclosure of a diagnosis of cancer to adult patients. The Horikawa study found that in 1993 disclosure of a diagnosis of cancer was made by physicians to only 27% of their Japanese patients, whereas five years later, in 1998, disclosure of the diagnosis of cancer increased to 71%. These investigators state flatly that the higher level of disclosure in 1998 is to be explained by the growing social importance of informed consent.[18, 19] This rate of change in the Japanese medical context seems to almost completely close what had until the late 1990s been the biggest gap in disclosure and consent practices between American and Japanese physicians.

A seventh study, by Yasuhiko Miura and associates, reported in 2006, contains results about how well Japanese families and physicians understand what patients actually want.[20] Using a questionnaire, they studied 450 dialysis patients in 15 hospitals in Japan. They found that only 47% of patients believed that their families could correctly report what they would want in the way of life-sustaining treatments; and only 31% believed that their physician could do so. As it turned out, about 68% of families made correct predictions of what the patients’ preferences would be. Physicians were slightly less accurate in reporting what their patients would want. Investigators point out that the ability of both families and physicians to accurately predict patient pref-

erences is only slightly above chance. These investigators note that their conclusions generally agree with the results of similar studies in the United States.

Finally, I mention a 2006 analysis of “Informed Consent Revisited: Japan and the U.S.,” by Akira Akabayashi and Brian Slingsby—a view expanded on in their recent book with Satoshi Kodama.[21] They assert that informed consent is now an “imperative aspect of clinical medicine worldwide” and that “nondisclosure is no longer practiced regularly.” They analyze the history and meaning of “informed consent” in Japan, noting the importance of recently issued “Professional Ethics Guidelines for Physicians” of the Japan Medical Association, which asserts that “physicians have an ethical obligation to inform patients” and to “fully disclose all relevant information,” even though physicians have some “leeway not to inform patients directly.” They note similarities in the U. S. and Japan in the system as it now exists and maintain that any differences in cultures are “far less important than the need to understand each patient and family.”

The six studies and the seventh commentary that I mentioned in this section show the shallowness of the received view about cultural differences, at least when it comes to the imperative of receiving an informed consent. Both the U. S. and Japanese medical cultures have been in a process of progressive change over the course of the last 25 to 35 years, and both have been chipping away at past paternalistic practices.[22, 23, 18] The idea that there is a deep divide in medical ethics of consent and paternalism between East and West should now die a quiet death.

It might be maintained that the goal of “looking and seeing” what Japanese beliefs and practices are might not be well served by the attention given in this section to empirical studies using questionnaires and the like. These instruments might motivate both patients and physicians to say what they think they are expected to say. I do not deny that there are methodological limits to these studies, but their convergence is important and cannot be dismissed.

## HUMAN RIGHTS AND COMMON MORALITY

I will hereafter assume that there is little, if any, credibility in the received view of differences in bioethics. I move on now to ask whether there is good reason to think there is a substantial, globally shared agreement over moral matters—and, if there is not, then whether there should be. I am shifting from a paradigm case of shared belief to the far more general subject of universal morality, or common mo-

rality, first considering what we today conceive as human rights. Again I will argue against a view that has been prevalent in the literature. This view is related to the received view, but now I focus on the claim that beliefs in human-rights are western inventions uncongenial to eastern moral and political views. I concentrate on human rights because this category occupies the most prominent place today in discussions of universal morality.

The literatures of philosophy, political science, and bioethics often discuss problems of human rights through the lens of “human rights theory” or “political theory.” My concentration here is not on such theory but on the underlying cultural values in moral traditions that gave rise to the discussions that have occurred at least since the seventeenth century in human rights theory. The fact that these values may not have been designated “human rights” is unimportant to the argument.

#### SEN’S ACCOUNT OF RIGHTS AND EAST-WEST DIFFERENCES

I begin with an argument presented by Amartya Sen in a lecture on “Human Rights and Asian Values.” [24, pp. 10, 13, 17, 27, 30] Since Sen is from India, his moral outlook presumably descends from an Eastern culture. But Sen rejects the way Eastern views are often presented, especially when it comes to issues of freedom and human rights. Sen points out that the idea of “Asia as a unit” with a set of Asian values about freedom that are different from those of the West has no historical grounding. He notes that 60 percent of the people in the world live in Asia, with virtually nothing to solidify them as a uniform moral culture—or to distance them as a culture segregated from Europe, for that matter. Sen argues that “There are no quintessential values that apply to this immensely large and heterogeneous population, that *differentiate* Asians as a group from people in the rest of the world.” He finds that the major constituent components of basic ideas of liberty, especially political liberty, are present in both Eastern and Western traditions.

Even if the concept of human rights and human rights theory are relatively new to *all* parts of the world, as they are, the values that gave rise to these conceptions need not be new. Sen’s claim, as I understand him, is that the thesis that the values underlying human rights theory are friendly to Western tradition and alien to Eastern tradition is “hard to make any sense of.” I completely agree with him.

In speaking of freedom and authority in the East and the West, Sen need not be taken to mean that individual autonomy is prized *to the same extent* in the East as in

the West. Perhaps many populations in the East prioritize community and authority over individual autonomy to a *higher degree* than do many populations in the West. But this thesis does not entail that Eastern populations deprecate or reject either individual autonomy or political liberty. Sen's claim is that, as a moral matter, liberty rights are not antithetical to Eastern traditions of freedom and that claims of human rights are not less important in one place by comparison to another.

### UNIVERSAL MORALITY: ITS BROAD SCOPE

The point of human rights language is to provide standards that transcend norms and practices in particular cultures that conflict with human rights, but universal morality—the common morality shared by all morally committed persons—is composed of much more than what we today designate as human rights. These “rights” are merely one way of carving out the territory of universal morality. We also share universal morality's *rules*, *virtues*, and *ideals*. I will now briefly examine these three categories of rules, virtues, and ideals.

### UNIVERSAL RULES OF OBLIGATION

I start with a few examples of what I will call rules of obligation in the common morality: These rules require not killing, not causing pain or suffering to others, preventing evil or harm from occurring, rescuing persons in danger, telling the truth, nurturing the young and dependent, keeping one's promises, not stealing, not punishing the innocent, and obeying the law. These rules of obligation have been justified in various ways in various philosophical theories, but I will not treat problems of *justification* here. These cross-cultural norms are implemented in different ways in different communities, but the general norms themselves are not culturally contested in any community of persons committed to morality.

### UNIVERSAL VIRTUES

Common morality also contains standards that are moral character traits, or virtues. Here are some examples: honesty; integrity; nonmalevolence; conscientiousness; trustworthiness; fidelity; gratitude; truthfulness; lovingness; and kindness. These human traits are universally admired (pp. 33—34, 46—50),<sup>[25]</sup> and a person is



deficient in moral character if he or she lacks one or more of these traits. Negative traits opposite the virtues are *vices*—for example, malevolence, dishonesty, lack of integrity, cruelty, etc. These character traits are substantial moral defects, universally so recognized by persons committed to morality.

### UNIVERSAL IDEALS

The final of my three examples of the common morality (in addition to rights) is moral ideals, such as charitable goals, community service, maximum dedication to one's job, and service to the poor. These aspirations are not *required* of persons, but they are universally *admired* and *praised* in persons who act on them (pp. 20—26, 76—77).[26] Four examples are exceptional forgiveness; exceptional generosity; exceptional compassion; and exceptional thoughtfulness.

Some diversity of judgment will arise in interpreting and implementing all of the norms I have used as examples. My claim is only that these norms are shared across cultures and are universally recognized by morally committed persons.

### THE UNIVERSALITY OF PRINCIPLES OF RESEARCH ETHICS

I will now extend this discussion of rights, rules, virtues, and ideals to what I take to be a fact about *recent developments* in biomedical research ethics where a base of values spread from one part of the globe to what is, in effect, a universal presence. Forty years ago, or even thirty years ago, there was no recognized universal research ethics of the sort that has become familiar to us in recent years. There was then scarcely any research ethics. Today we can see a vast similarity, in virtually every developed nation, in moral codes, declarations, laws, and regulations governing research with human subjects. There are understandable and justifiable differences from country to country, but the differences pale in comparison to the sea of similarity in the moral and legal norms governing how biomedical research can and cannot be conducted.

Many principles are globally accepted, and violations of them are universally condemned. Examples include:

Disclose all material information to subjects of research.

Obtain a voluntary, informed consent to medical interventions.

Maintain secure safeguards for keeping personal information about subjects private and confidential.

Receive surrogate consent from a legally authorized representative for incompetent subjects.

Ethics review committees must scrutinize and approve research protocols.

Research cannot be conducted unless its risks and intended benefits are reasonably balanced; and risks must be reduced to avoid excessive risk.

Special justification is required if proposed research subjects are vulnerable persons.

Several global organizations and many governments have subscribed to these norms in guidelines, codes, or regulations, but the force and authority of the norms is not contingent on particular laws or agreements. These norms are human rights of research subjects and they are in each case correlative to duties of researchers and sponsors. (See, as one of many examples, the World Medical Association's *Declaration of Helsinki*.<sup>[27]</sup>)

Having now explored the categories of rights, principles, virtues, and ideals, I could go on to several other domains of universal morality, but this project is too much of an undertaking for this paper. In making the claims I have advanced about global moral beliefs I do not deny that historical context and political circumstance have had a major role in the way these values have been transmitted across the centuries. Research ethics is a good example. I have not tried to explore such an historical point of view, as it too requires more than can be attempted in this paper.

## MULTICULTURALISM

In conclusion, I turn to the related subject of multiculturalism, which I interpret as a form of human rights theory. However, many writers see matters very differently. They maintain that the idea of a universal, or common, morality does not appreciate the "multicultural world" that we now experience. They hold that multiculturalism and secular pluralism have delivered a post-modern world in which our robust past beliefs in the universality of moral precepts are no longer sustained. For example, H. Tristram Engelhardt and Kevin Wildes maintain that a "theoretically intractable

secular moral pluralism” pervades the modern world, rendering it unamenable to any form of common morality. From this perspective, one cannot say anything about what constitutes proper physician-patient relationships, what human rights might mean, or what constitutes virtue and character—except from within a commitment to the moral framework of a particular moral community.[28, 29] This theory too makes no sense to me.

It is also dangerous in what it defends. Among the human rights that today should be most vigorously defended are rights against the oppression of minorities, women, children, and other targeted groups. When complaints about violations of rights arise, governments or other controlling groups often use the excuse that they are treating women and children in accordance with *their* cultural and religious traditions. The premise that cultures have a right to protect their traditional values, beliefs, and rituals is unacceptable when used to prevent women from educational opportunities, to exploit human subjects in research without appropriate consent, to foster oppressive child labor conditions, or to discriminate against minorities and disenfranchised populations. These practices are basic human rights violations.

#### THE UNIVERSALITY IN THE THEORY OF MULTICULTURALISM

Many of today’s exponents of the view that there are no universal norms have misrepresented the commitments and objectives of multiculturalist ethical theory. Multiculturalism is the theory that respect is owed to cultural traditions because morality demands this respect.[30] Multiculturalists accept the principle that group traditions, institutions, perspectives, and practices should be respected and should not be violated as long as the members of the group do not themselves violate the standards of the common morality. The objective of multiculturalism is to provide a theory of the norms that universally should guide the protection of vulnerable cultural groups when threatened with marginalization or oppression caused by one or more dominant cultures.[31, 32] Multiculturalism from this perspective has a human-rights dimension.

#### CULTURAL DIVERSITY

These comments do not undercut the importance and legitimacy of cultural diversity. A multiculturalist account protects diversity. From the fact that we are re-

quired to tolerate and protect different cultural traditions, different religious views, and the like, it does not follow that *all* convictions and practices must be tolerated and protected. Some basic norms govern everyone's conduct, whereas some norms hold exclusively for particular groups.

## CONCLUSION

I have argued that it is easy to overlook similarities in cultures because of various cultural differences that capture our attention. Whatever our differences, the U. S., Europe, and Japan share a great deal in common, and no differences in our cultural histories now present major barriers to accord on basic values in bioethics. My perspective has been universalistic from the first section on shared values such as informed consent requirements to the final two sections on human rights and multiculturalism. In these last two sections it became apparent that multiculturalist theory is a form of human rights theory. In the first section the conclusion reached was, in effect, that the right to give an informed consent to a medical intervention is a human right, even if rights language is not used.

These themes have great interest for contemporary bioethics, because there continues to be a shift in the direction of a globally shared bioethics. I have highlighted both clinical ethics and research ethics as examples of the gradual shift to a global bioethics. My hypothesis is that we are well down the path of a process that is still today leveling previous differences through cultural exchange and learning. I am not maintaining that a moral imperialism is being imposed universally by the most powerful nations so that learning is unidirectional from west to east. I mean that we have much to learn from each other that we can share. For example, at the current time in the U. S. we are learning to modify our practices of "community engagement" to protect the interests of participants in research and to create a better set of responsive relationships while engaging in research with human subjects. In this conception, distinctive social, cultural, political, and economic contexts of research participants will be taken into consideration and rules and practices negotiated. U. S. investigators and writers in bioethics have much to learn on this subject from other nations with a history of keenly sensitive practices.

I project that a dialogue and leveling of this sort will continue to occur in bioeth-

ics and public policy, hopefully erasing all differences of actual practice that prevent human rights from being firmly in place.

*Acknowledgements: None*

#### REFERENCES

- 1 Bai K, Shirai Y, Ishii M. In Japan, consensus has limits. *Hastings Center Report* 1987;17:S18-S20.
- 2 Shirai Y. Japanese attitudes toward assisted procreation. *Journal of Law, Medicine, and Ethics* 1993;21:43-53.
- 3 Kimura R. In Japan, Parents participate but doctors decide. *Hastings Center Report* 1986;16:22-23.
- 4 Ishibashi A. Four concepts that distinguish pediatric oncology care in Japan from that in the United States: telling the diagnosis, length of hospitalization, home care, and support systems. *Journal of Pediatric Oncology Nursing* 1996;13:226-32.
- 5 Gordon J-S. Global ethics and principlism. *Kennedy Institute of Ethics Journal* 2011;21:251-76.
- 6 Faden RR, Beauchamp TL. *A History and Theory of Informed Consent*. New York: Oxford University Press 1986. Chapters 3-6.
- 7 Katz J. *The Silent World of Doctor and Patient*. New York: Free Press 1984.
- 8 Hagman DG. The medical patient's right to know: report on a medicallegalethical, empirical study. *UCLA Law Review* 1970;17:758816.
- 9 Hershey N, and Bushkoff SH. *Informed Consent Study*. Pittsburgh, PA: Aspen Systems Corporation 1969.
- 10 Fellner CH, and Marshall JR. The myth of informed consent. *American Journal of Psychiatry* 1970;126:124550.
- 11 Alfdi RJ. Informed consent: a study of patient reaction. *JAMA: Journal of the American Medical Association* 1971;216:132529.
- 12 Hattori H, Salzberg SM, Kiang WP, Fujimiya T, Tejima Y, and Furuno J. The patient's right to information in Japan--legal rules and doctor's opinions. *Social Science and Medicine* 1991;32:1007-1016.
- 13 Mizushima Y, et al. A survey regarding the disclosure of the diagnosis of cancer in Toyama Prefecture, Japan. *Japanese Journal of Medicine* 1990;29:146-155.
- 14 Morioka Y. Informed consent and truth telling to cancer patients. *Gastroenterologia Japonica* 1991;26:789-92.
- 15 Asai A, Fukuhara S, and Lo B. Attitudes of Japanese and Japanese-American physicians towards life-sustaining treatment. *Lancet* 1995;346:356-59.

- 16 Asai A, et al. Medical decisions concerning the end of life: A Discussion with Japanese Physicians. *Journal of Medical Ethics* 1997;23:323-27.
- 17 Gabbay BB, et al. Negotiating end-of-life decision making: a comparison of Japanese and U. S. residents' approaches. *Academic Medicine* 2005;80:617-21.
- 18 Horikawa N, Yamazaki T, Sagawa, M, and Nagata, T. Changes in disclosure of information to cancer patients in a general hospital in Japan. *General Hospital Psychiatry* 2000;22:37-42.
- 19 Horikawa N, Yamazaki T, Sagawa M, and Nagata T. The disclosure of Information to Cancer Patients and its relationship to their mental state in a consultation-liaison psychiatry setting in Japan. *General Hospital Psychiatry* 1999;21:368-73.
- 20 Miura Y, et al. Families' and physicians' predictions of dialysis patients' preferences regarding life-sustaining treatments in Japan. *American Journal of Kidney Diseases* 2006;47:122-30.
- 21 Akabayashi A, Slingsby BT. Informed consent revisited: Japan and the U.S. *American Journal of Bioethics* 2006;6:9-14.
- 22 Ninomiya R. Contemporary Japan: medical ethics and legal medicine. In: *Encyclopedia of Bioethics*, ed. Warren Reich, Vol. 3. New York: Free Press 1978:926-930.
- 23 Novack DH, et al. Changes in physicians' attitudes toward telling the cancer patient. *Journal of the American Medical Association* 1979;241:897-900.
- 24 Sen A. *Human Rights and Asian Values*. New York: Carnegie Council 1997.
- 25 Nussbaum M. Non-relative virtues: an Aristotelian approach. In: *Ethical Theory, Character, and Virtue*, ed. Peter French et al. Notre Dame, Ind.: University of Notre Dame Press 1988:32—53.
- 26 Gert, B. *Common Morality: Deciding What to Do*. New York: Oxford University Press 2007.
- 27 The World Medical Association. *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*, Part B, Basic Principles for all Medical Research, 2008 revision; first adopted 1964.
- 28 Engelhardt HT Jr, and Wildes KW. The four principles of health care ethics and post-modernity: why a libertarian interpretation is unavoidable. In: *Principles of Health Care Ethics*, ed. Raanan Gillon and Ann Lloyd. London: John Wylie & Sons 1994:135-47.
- 29 Engelhardt HT. *The Foundations of Bioethics*, second edition. New York: Oxford University Press 1996.
- 30 Siegel H. Multiculturalism and the possibility of transcultural educational and philosophical ideals. *Philosophy* 1999;74:387-409.
- 31 Taylor C, Gutmann A, Rockefeller SC, Walzer M, Wolf S. In: *Multiculturalism and the Politics of Recognition*. ed. Amy Gutmann. Princeton, NJ: Princeton University Press 1992.

<sup>32</sup> Fullinwider RK, Gutmann A, Taylor C, In: Fullinwider, ed. *Public Education in a Multicultural Society: Policy, Theory, Critique*. Cambridge: Cambridge University Press, Cambridge Studies in Philosophy and Public Policy 1996.

# Oxford Uehiro Prize in Practical Ethics

## Winning Essays

---

In this special two- part series for the *Journal of Practical Ethics*, we present the winning essays from the 2014-15 *Oxford Uehiro Prize in Practical Ethics*.

For the prize, graduate and undergraduate students enrolled at the University of Oxford were invited to submit a short essay on any topic in Practical Ethics, with two winners from each category giving a presentation of their essay to an open audience as the deciding round for first and second places in the competition.

In this issue we present the overall winners from each category, Jessica Laimann (Graduate), and Xavier Cohen (Undergraduate). The essays have been revised in the light of reviewer comments.

We look forward to presenting the two other prize winning essays, Miles Unterreiner (Graduate), and Dillon Bowen (Undergraduate) in a forthcoming issue.

The prize is an annual event, and we hope to continue this series in future issues.



# Should we prohibit breast implants? Collective moral obligations in the context of harmful and discriminatory social norms

JESSICA LAIMANN

*University of Bristol*

## ABSTRACT

In liberal moral theory, interfering with someone's deliberate engagement in a self-harming practice in order to promote their own good is often considered wrongfully paternalistic. But what if self-harming decisions are the product of an oppressive social context that imposes harmful norms on certain individuals, such as, arguably, in the case of cosmetic breast surgery? Clare Chambers suggests that such scenarios can mandate state interference in the form of prohibition. I argue that, unlike conventional measures, Chambers' proposal recognises that harmful, discriminatory norms entail a *twofold* collective moral obligation: to eliminate the harmful norm in the long run, but also to address unjust harm that is inflicted in the meantime. I show that these two obligations tend to pull in opposite directions, thus generating a serious tension in Chambers' proposal which eventually leads to an undue compromising of the second obligation in favour of the first. Based on this discussion, I develop an alternative proposal which, instead of prohibiting breast implant surgery, offers compensation for the disadvantages suffered by individuals who decide not to have surgery.

---

## 1. INTRODUCTION

Liberal moral theory generally considers paternalistic interventions, that is, interventions with an individual's choice that are justified exclusively in terms of the individual's own good, as *prima facie* morally wrong. Call this the non-intervention rule. The presumption behind the non-intervention rule is that we ought to respect the individual's autonomy—unless we have reason to think that someone's self-harming behaviour is not the result of that individual's autonomous choice, for instance because of psychological or cognitive impairments that undermine some minimal requirements of rationality, we ought not to interfere with their decision in order to promote their own good.

Clare Chambers does not object to the general liberal stand against paternalism. However, she argues that some self-harming choices do permit state intervention. These are choices made in the context of *discriminatory and harmful social norms* (see Chambers 2008). Such norms typically require individuals to inflict some form of harm on themselves in order to attain socially regulated benefits or to avoid socially regulated disadvantages. Importantly, harmful social norms are characterised by the fact that the link between the self-harming behaviour and the regulated benefits is a purely social one—engaging in the harmful practice makes it easier or more likely for the individual to attain the benefit primarily or only in virtue of the existence of certain social conventions, values, or attitudes. Hence, athletes who decide to undergo a harmful training routine in order to break a personal record are not victims of a harmful social norm. Their engagement in harmfully intensive training allows them to break their personal record independently of surrounding social values or attitudes.

Sometimes the harm-conditionality of socially regulated benefits applies only to some groups in society but not others. Hence, while some individuals need to engage in self-harming behaviour in order to attain certain benefits, others can attain comparable benefits 'for free', without having to pay the costs of self-harm. In such cases, the relevant norm is both harmful and discriminatory, thus undermining social or political equality. Chambers suggests that such norms are particularly problematic if they feed into existing inequalities, such as those related to gender or race.

According to Chambers, the practice of cosmetic breast implant surgery is motivated by such a harmful and discriminatory social norm. The relevant norm requires that women have breasts of a certain shape and size in order to be socially valued and respected (in virtue of being considered sufficiently beautiful or sexually attractive) and to succeed in a number of career paths, such as being an actress, or a model, or simply to “become famous” (see Chambers 2008, 197-198). As a result, the norm disadvantages women who do not conform in psychological, professional, or economic respects. Chambers argues that the underlying norm only affects women, hence is discriminatory. It is also harmful, in several different ways. Chambers focusses on physical harm and status harm. Breast implants, Chambers explains, involve painful and medically unnecessary surgery which likely requires lifelong further operations and poses serious long-term health risks (e.g. in the form of implant rupture or capsular contracture). In addition, she argues, having breast implants inflicts status harm on women because it casts them as objects of male sexual desire, hence as inferior to men (see Chambers 2008, 186-190). Finally, breast implant surgery and the further medical treatments which are likely to occur require substantial financial investments and thus impose economic harm in addition to physical and status harm.

Against this background, Chambers defends prohibition of breast implants both as a legitimate and, at least in principle, effective means of addressing the underlying harmful and discriminatory social norm. Importantly, her proposal aims to prosecute not women who seek breast implants, but individuals and companies who provide it, such as surgeons or manufacturers of implants (Chambers, 2008, 217).

I believe prohibition provides the wrong solution to an accurately diagnosed problem. For this purpose, I first identify a crucial strength of Chambers’ proposal. Unlike conventional measures, such as education campaigns and media regulations, it recognised that the existence of discriminatory, harmful norms poses a *twofold* moral obligation—not only to eliminate the norm in the long run, but also to address the ongoing infliction of unjust harms while it remains in place (Section 2). Second, I discuss Chambers’ defence of prohibition in more detail (Section 3). I argue that Chambers’ defence against paternalism fails (Section 3.1), and that prohibition’s credentials with regard to promoting gender equality, and providing respect for women are more mixed than she admits (Sections 3.2 and 3.3). I then discuss how these problems reflect a tension between the different requirements entailed by the first and the second moral obligation, and conclude that prohibition ought to be rejected for unduly compromising the second moral obligation in favour of the first. Drawing on

these insights, I develop an alternative proposal that combines conventional measures, requirements for informed medical consent, and compensation payments (Section 4).

## 2. WHY PROHIBITION? THE TWOFOLD MORAL OBLIGATION FOR HARMFUL SOCIAL NORMS

According to Chambers, women's desire for breast implants is the product of a social context that links women's conforming to objectifying norms of physical appearance with beauty, success, and social appreciation. It therefore seems appropriate to focus on exposing and altering the circumstances that lead women to desire breast implants, rather than hindering women from having breast implants once these social circumstances have made their mark. Frequently discussed measures such as education campaigns and media and advertisement regulations try to achieve exactly this. Education campaigns try to expose harmful and discriminatory norms as symptoms of a background culture of gender inequality and misogyny, hence battling harmful social norms by more comprehensive measures. Media and advertisement regulations try to hinder modelling agencies or advertisement and movie companies from primarily engaging or displaying women who correspond to harmful and objectifying social norms. By increasing the diversity of female body types presented in media and advertisement, they aim to counteract harmful and objectifying beauty standards for women. I refer to these measures as *conventional measures*.

Chambers is aware of conventional measures and acknowledges their role in undermining harmful social norms (Chambers 2008, 68). In fact, she seems to understand prohibition and conventional measures as complementary rather than competing. However, the question remains as to why we should consider the more provocative idea of prohibiting breast implants rather than simply make do with conventional measures that appear to be less problematic. According to Chambers, the question whether conventional measures are sufficient or need to be complemented with prohibition depends on *how harmful* the practice is that the harmful norm prescribes. Only if state prohibition does not seem "vastly disproportional" compared to the harm that it tries to prevent should we consider the option of prohibition (Chambers 2008, 198).

By stating the case for prohibition like that, Chambers refrains from pointing out that her proposal in fact addresses a systematic blind spot of conventional ap-

proaches to harmful social norms. While measures like education campaigns and media regulations are helping to change harmful, discriminatory norms in the long run, they leave unaddressed the ongoing harm and injustice suffered by the individuals who are affected by the norms in the meantime. For the time it takes conventional measures to change a relevant norm, a period I refer to as *transition period*, the norm continues to impose a dilemma on individuals affected by it: to either pay the price of self-harm in exchange for socially regulated benefits that others acquire ‘for free’, or to forego the benefit altogether and hence live with the resulting disadvantages.

Consider the case of breast implants. Here, women in the transition period either continue to undertake the painful and risky surgery so as to conform their appearance to an objectifying beauty standard, or they are sanctioned with psychological, economic, or professional disadvantages described above for failing to conform. Yet it seems that a society that is responsible for maintaining a harmful and discriminatory norm is also responsible for the harm and injustice that this norm inflicts on individuals during the period in which it is maintained.<sup>1</sup> This suggests that societies which maintain a harmful, discriminatory social norm have a *twofold* moral obligation—not only to change or eliminate the norm in the long run, but also to address the norm’s ongoing harmful and unjust effects on individuals.

Importantly, these two obligations coincide only in cases where the transition period is sufficiently short—i.e., where the norm would cease to exist shortly after means for eliminating it have been implemented. In such cases, it might be possible to eliminate the harmful norm before the individuals affected by it have experienced significant harm and injustice. As a result, both collective moral obligations could be discharged simultaneously by eliminating the norm. But this scenario looks like a mere theoretical possibility. In reality, harmful and discriminatory norms tend to be deeply culturally rooted, only allowing social progress at a snail’s pace. Even after the norms have been publicly acknowledged for the evil that they are, and conventional measures have been taken to challenge them, they nonetheless continue to exert their influence for long periods of time. In this case, conventional measures like education campaigns and media regulations will tackle the first moral obligation, but generally offer no way of addressing the second. They promote justice via social change in the

1. Note that I will not address in this paper the question whether members of a society are under a *retrospective* collective obligation to address the current generation of a disadvantaged group for norm-induced harms that have been inflicted by their predecessors on the previous generation(s) of the disadvantaged group.

long term, but effectively neglect to combat the harm and injustice that is inflicted on individuals in the meantime.

In accordance with Chambers' 'proportionality' consideration, one could admit that the second moral obligation is negligible in cases where the relevant harm appears relatively small, such as with regard to social norms requiring women to wear make-up. Yet, if the practice involves a painful and risky surgery that permanently forces someone's body to conform to a sexually objectifying beauty standard, such as in the case at hand, the ongoing infliction of harm in the transition period becomes an urgent moral concern alongside the need for long-term change. Hence, Chambers' proposal touches a crucial blind spot of conventional measures against harmful social norms. The question is whether we should also credit her proposal as a promising way of eliminating that blind spot.

### 3. PROHIBITING BREAST IMPLANTS

Chambers provides three arguments as to why prohibiting breast implants is principally a legitimate and effective way of undermining the harmful social norm that underlies the practice of breast implants. Her first argument aims to deflect the objection that her proposal is paternalistic. Her second argument can be understood as a non-paternalistic justification of prohibition. It states that, even if prohibition interferes with women's autonomy, it is justified in doing so because it achieves an overriding good—the elimination of the norm, and hence the promotion of gender equality. The third argument claims that prohibition is necessary to respect women as "desiring, choosing agents."

I will show that the first two arguments are in fact best understood as *instrumental* arguments for prohibition, interfering with the choices and preferences of women today in order to improve the situation for women tomorrow. I will reject these arguments on the grounds that they impose unjust costs for social change on women who are affected by the norm today. The third argument, by contrast, provides a *constitutive* argument for prohibition: it defends prohibition as a necessary requirement for respecting women as equal human agents. By arguing that the requirements for respect are more complex than Chambers admits, and ultimately best served by a policy of informed choice, I reject the argument from respect, too, and conclude that overall the case for prohibition is unconvincing.

### 3.1 AUTONOMY

To begin with, Chambers argues that her proposal is non-paternalistic because it *enforces* rather than contradicts the preferences of the individual whose choice it interferes with. This argument refers to Danny Scoccia's account of paternalism (see Chambers 2008, 222). Scoccia argues that interference with an individual's choice for her own good does not violate the individual's autonomy if the choice fails to express accurately the individual's preferences, and the individual would consent to the interference if she were fully rational (see Scoccia 1990, 330-31, cited in Chambers *ibid.*). According to Chambers, a ban on breast implants fulfils this criterion because it would undermine the social norm that motivates breast implants. Prohibition would thus allow women to achieve the regulated benefits without undergoing painful and risky surgery—and this, says Chambers, is what women affected by the norm actually prefer (see Chambers 2008, 223). As a result, Chambers argues, prohibiting breast implants would increase rather than limit the autonomy of women.

Note that this argument is not simply equating autonomy with preference-satisfaction. It is merely piggybacking on the fact that conflict with an individual's preferences is widely considered a necessary condition for paternalistic interventions with that individual's choice (see Arneson 1980, Sunstein 1991, Thaler & Sunstein 2008). On most accounts of paternalism, I am not acting paternalistically unless I am limiting, changing, or manipulating your decision *against* your own preference. As a result, showing that prohibition does *not* conflict with the preferences of women would be a promising way to escape the charges of paternalism.

But Chambers' argument turns out to be problematic. First of all, she presupposes that most women, even those who are willing to undergo breast surgery, actually have a preference for the non-existence of the social norm. She admits that prohibition of breast implants would undermine the autonomy of individuals who do *not* prefer achieving the benefit without undergoing surgery, but thinks that these are cases of "extreme particularity" and therefore do not support a decisive objection (see Chambers 2008, 226). However, if we think of the latter group of women as having internalised the social norm, it seems unlikely that their case will be a rare exception. Individuals who have internalised a social norm do not merely have an instrumentalist awareness that corresponding to the norm will bring them desired advantages, but have made the norm part of their personal belief and value systems. This situation seems to be rather widespread. For example, it seems that many, if not most, people

in Western societies hold a more or less conscious belief that thin people are more attractive than fat ones; that, as a woman, being physically attractive is conducive or even necessary for happiness and success in life; and, finally, that having breasts of a certain shape and size is part of that requirement.

But if internalisation of social norms is the rule rather than the exception, most individuals affected by the norm will not have a preference for the norm's non-existence that outranks their preference for complying with the norm. Having been socialised in a society that endorses these norms, they might never have contemplated that the relevant norms could be different, or what their lives might be like if they were. Hence, the idea that individuals may not have a preference for the non-existence of the social norm provides a stronger objection to Chambers' proposal than she admits.

Chambers could object that women who have internalised the norm that motivates cosmetic breast surgery are not fully rational, and that they would have a preference for the norm to be eliminated if only they would fully understand their situation. We might feel uneasy about basing state prohibition on such reasoning by conjecture, but for now, let us assume that the (actual or 'rationalised') preference structure of the large majority of women matches Chambers' description. Assume that, after thoroughly contemplating their situation, most women agree that their desire to have breasts of a certain shape and size is the product of a patriarchal society that values women primarily as objects of male sexual gratification, and that they would be better off without the objectifying norm. Suppose that women therefore prefer, first, for the norm not to exist (which means being able to achieve the benefit without having to undergo surgery); and second, if their first preference is unattainable, women prefer to undergo surgery in order to attain the benefit. If women's actual preference structure indeed matches this description, Chambers suggests, prohibition would not be paternalistic, because it would realise their highest preference by destroying a norm which hinders achieving it.

Under this assumption, however, Chambers' proposal still faces the problem of being based on an account of the individuals' preferences that is in relevant ways incomplete: it addresses women's preferences for different ends without considering the means by which these ends will be brought about. But means are important. If my desired end can only be brought about by means that I find objectionable, I might well decide to forego the desired end and settle for the second-best option. For instance, I have a preference for you giving me one million dollars over you not giving



me one million dollars, yet if you inform me that your means of obtaining the one million dollars is to kidnap a child and demand a ransom, I would probably change my preference with regard to the money. In the case at hand, Chambers presupposes that women prefer for the norm not to exist, but she does not consider whether women might object to achieving this end by banning cosmetic breast surgery. But women may prefer getting rid of the harmful norm and still reject prohibition of cosmetic breast surgery. This holds true even if (following Chambers and Scoccia), we require their decisions on the matter to fulfil some adequate conditions of rationality. Supposedly, such conditions for rationality would require, among other things, that women know that a ban on cosmetic breast surgery would result in a collapse of the social norm (assuming that it does), and that this would allow them to achieve the desired benefit without breast implants. However, there might still be women who consider prohibition an inappropriate response to harmful social norms. For instance, a woman might find it a problematic infringement of her and other women's authority over their own bodies to prohibit cosmetic breast surgery. She might think that women should refrain from having breast implants, but not be hindered to have them against their own wills. As a result, there might be women who principally welcome the elimination of the relevant norm but who object to the prohibition of breast implants, without thereby acting irrationally.

Now, let this point be granted, too, and assume that women do in fact have a preference for abandoning the social norm by prohibiting breast implants. This leads us to what I believe is the most pressing problem of Chambers' account: even if we grant all the above assumptions, it is still uncertain whether prohibition will fulfil the preferences of women who are affected by it. To see this, consider again Chambers' claim that her proposal enforces individuals' preferences. This claim crucially depends on the idea that prohibition will undermine the relevant norm within a time frame of less than one generation. If the norm stays in place for longer than that, individuals who are affected by Chambers' proposal can achieve neither their first nor their second preference: they cannot achieve the benefits without having breast surgery because during their lifetime, the norm is still regulating their desired benefits—and they cannot achieve these benefits by undergoing breast surgery since this option has been banned by the state.

Chambers agrees that such a situation clearly has to be avoided (see Chambers 2008, 208). But it is not clear that her proposal can realistically do that. For one thing, it is not evident, and Chambers does not give us an idea of, how long the process

of eliminating the harmful norm is likely to take. The history of Western beauty standards is ambivalent in that regard, hence only provides a very rough idea of the expectable time scale. Without directed interventions, some beauty norms seem to fluctuate at the scale of decades, while others vary very little over centuries. Even if prohibition would succeed in undermining the relevant norm within a single decade, for women who are denied breast surgery early in the period of prohibition the costs might still be high and the benefits meagre. When the harmful norm finally ceases to function, these women will be in a different stage of their lives. They might have lived through a period continuously perceiving their bodies as inadequate and in need of surgical improvement, possibly at a time of their lives crucial to the establishment of one's sense of self-worth. Chances to enter a desired career in modeling, entertainment, or acting might have passed irretrievably. As a result, even in the best case scenarios, the net benefit of prohibition might be a very limited one for these women. This problem is augmented by the fact that it is unclear how significant a contribution prohibition would make in undermining the underlying norm *over and above* what could already be achieved by conventional measures like media and advertisement regulations. Neither of these measures has been tested, alone or in combination. It might well be that what determines the impact of the norm is not so much the actual number of women who conform to it, but rather the fact that these women's bodies are highly overrepresented in the media, and are presented as more desirable, successful, or valuable than others. In that case, the contribution of media regulations would be substantial but the contribution of prohibition only marginal, hence probably insufficient for outweighing the costs it imposes on affected women. As a result, even if we grant all of Chambers' assumptions about women's preference structures, there are reasons to doubt that prohibition is in accordance with the preferences of those women who would be affected by it.

### 3.2 GENDER EQUALITY

One could object that there is an ambiguity about whom Chambers' proposal is primarily trying to help —women who are currently affected by the norm, or future generations of women. If we assume the former, as argued above, Chambers' proposal is likely to conflict with the preferences of those women who are affected by it, hence cannot be defended against the charge of paternalism on those grounds. But some passages suggest that Chambers might be more concerned with the harm and

inequality confronted by 'women in general' in a particular society, i.e. mostly future generations of women in that society (see Chambers 2008, 265). If that is the primary aim of Chambers' proposal, it would not be paternalistic *despite* conflicting with the preferences of those who are affected by it, because the interference no longer aims to promote *their* own good. Instead, prohibition would be an interference with the autonomy of women today in order to reduce the inequality and harm suffered by future generations of women. But again, there are several problems with this argument.

### 3.2.1 THE PROBLEM OF EFFICACY

If Chambers' proposal is successful in the long run, future generations of women will no longer be subject to the harmful norm. But there are reasons to doubt that Chambers' proposal will be a particularly good or effective tool in achieving this aim. For one thing, as argued above, prohibition of cosmetic breast surgery will not erase or even significantly reduce the pervasive imagery that promotes the harmful norm. There will still be individuals who conform to the standard without surgery, and there will still be image editing programmes. All prohibition can achieve is to decrease the number of women whose bodies conform to the social norm. But by doing that, it also increases exclusivity. In some examples, such as body size or tanned skin, historic records suggest a positive correlation between the rarity of a physical characteristic and its appeal as a beauty standard. It is thus possible that Chambers' proposal *increases* rather than decreases the appeal and effectiveness of the social norm underlying cosmetic breast surgery.

More importantly, even if prohibition succeeds in undermining the particular harmful social norm motivating breast surgery, the benefits for future generations of women might well be sparse. As Chambers acknowledges, the social norm under consideration is the product of a wider context of gender inequality and oppression. Yet, by focussing on particular social norms, her proposal is addressing the symptoms of gender inequality without challenging the underlying causes. Hence, it seems likely that she is battling a Hydra. Norms regarding the size or shape of women's breasts might change or disappear, but unless the background issues of gender inequality and oppression are challenged, similarly harmful norms are likely to replace it. Again, these arguments cast doubt on the idea that specific intervention in the form of prohibition has any substantial impact in the battle against harmful social norms and gender inequality above and beyond what could be achieved by conventional

measures alone, especially if they are designed to address the underlying problem of gender inequality and the objectification of women in a more comprehensive manner.

### 3.2.2 THE PROBLEM OF UNFAIR TRANSITION COSTS

Finally, assume that prohibition is an effective means for undermining harmful social norms. In that case, the previous discussion nevertheless suggests that Chambers' proposal involves *unfair transition costs*. To see this, consider the following toy account of transitional justice. Assume that the alleviation of something wrongful, such as undermining a harmful and unequal social norm, *in the long term* requires that certain costs be paid *in the short term*. Who should pay the costs? In case someone can be identified as responsible for creating or sustaining the wrong, the obvious response would be to require them to pay. In the case at hand, the relevant wrong, i.e. the harmful and unequal social norm, has not been created or sustained by any specific individual or group of individuals. Instead, though the norm likely results from values whose existence precedes that of most current members of society, it is currently sustained by 'society as a whole' in the form of many small interactions of its members that reproduce the underlying values.

As a result, the responsibility for sustaining the social norm is a collective one. This suggests that the costs, too, ought to be paid collectively. Chambers' proposal, however, by suggesting to undermine the social norm by hindering women who want to have breast implants from having them, only affects women. One could argue that, like all members of society, women share responsibility for sustaining the social norm.<sup>2</sup> Moreover, by undertaking the surgery, women who desire breast implants would further reinforce the harmful norm, hence take on additional responsibility for the norm's existence. Yet, unlike other members of society, women who are willing to undergo surgery are also the norm's primary victims. After all, their desire to have breast implants, according to Chambers' analysis, is simply an attempt to overcome the psychological, professional, or economic disadvantages that the norm imposes on them—costs which apparently weigh heavy enough for them to make a painful, risky, and expensive surgery an attractive option. Hence, instead of distributing the costs equally among those who are responsible for sustaining the social

2. Acknowledging that the victims of the norm are largely women, while the beneficiaries of the norm are largely men, one could also argue that men bear primary responsibility and hence ought to pay the lion's share of the costs (see May & Strikwerda 1994). This would strengthen the case against Chambers' proposal, which put the costs exclusively on women.

norm, Chambers' proposal puts the lion's share of the costs on women—largely on those who are already most negatively affected by the norm's existence. Distributing of the costs for social change at the expense of those women who suffer the strongest disadvantages under the status quo effectively suggests fighting a form of oppression at the cost of the oppressed, hence is a problematic means of promoting justice and gender equality.

It could be argued that this injustice is mitigated by the fact that those women who are the norms' primary victims would also be the primary beneficiaries of a ban on breast implants that undermines the harmful norm. But in the light of the previous discussion, we can see that the injustice is instead further augmented by a form of transitional injustice. As argued above, the timescale at which the mechanism for undermining social norms by prohibition operates is likely to be such that the individuals who pay the costs will enjoy the benefits only to a limited degree or not at all. If Chambers' proposal succeeds, *future women* would indeed no longer have to face the pressure to undertake unnecessary and harmful surgery. But women *in the transition period* pay the price of undermining a harmful social norm without reaping the benefits. Instead, prohibition effectively deprives these women of their only available means for overcoming the psychological, economic, or professional disadvantages that the norm continues to impose. In sum, even if Chambers' proposal would in the long run prove effective in undermining the harmful norm and in promoting gender equality, this progress comes at a price. Instead of being borne equally by those responsible for the norm's existence, the costs for undermining the norm are disproportionately shouldered by women who suffer mostly under it.

### 3.3 RESPECT

I have argued that the first two defences of Chambers' proposal are problematic. Pace Chambers, prohibition is susceptible to paternalism charges because it may not be in accordance with the preferences of those affected by it. In addition, it achieves progress with respect to gender equality only by disproportionately burdening those who it claims to protect—individuals who are affected by the harmful, discriminatory norms. I will now consider a third defence of Chambers' proposal, which says that the prohibition of breast implants is necessary to provide respect for women.

Before I begin, note that Chambers' argument about respect is logically independent from the argument regarding gender equality in the previous section. The

previous argument about gender equality addresses the *instrumental* value of prohibition in undermining the harmful social norm, and in advancing gender equality more generally. The argument about respect is also concerned with gender equality, but is looking at prohibition in a *constitutive* rather than in an instrumental way. It is not considering prohibition primarily as a tool for undermining the norm and promoting gender equality, but instead as a communicative act that is constitutive of respecting women as equals. Hence, prohibiting breast implants could be detrimental or neutral for promoting gender equality in the instrumental sense—for instance because it is ineffective, or makes the norm more rather than less powerful—and, at the same time, contribute towards gender equality in the constitutive sense because it is an act of respecting women as equals. Thus, the question in the following is whether the benefits of prohibition in its constitutive role can make up for unjust costs that it imposes in its instrumental role by curtailing women’s autonomy and disproportionately burdening them in the quest for social change.

For Chambers, the constitutive case seems to be a clear one. The message communicated by allowing a woman to have breast implants, Chambers argues, is that her feeling of inadequacy with natural breasts, and her resulting desire to undergo painful and dangerous surgery “are understandable and worthy of respect” (Chambers 2008, 198-199). According to Chambers, we are thereby also expressing respect for the social reality in which women develop the desire to have breast implants, hence express our support for the status quo (*ibid.*). Prohibition, by contrast, is an attempt at saying “you as an individual are worthy of more respect than is compatible with you undergoing breast surgery [for instance] in an attempt to become successful” (Chambers 2008, 200). In view of this, Chambers concludes that it is impossible to respect women’s desire to have breast implants and at the same time respect them as “desiring, choosing agents” (Chambers 2008, 198). Only by prohibiting breast implants can we voice criticisms of the status quo and the role of women in it, and hence respect women who are affected by the harmful norm.

This argument forcefully addresses a valid concern, yet I believe that the issue of respect in the context of harmful and discriminatory social norms is more complex than Chambers acknowledges. In the following, I argue that, once we consider a more nuanced account of respect, impeding women from having breast implants may not be necessary, and, in fact, may even be detrimental, to respecting them as equal agents.

To begin with, it is important to understand how Chambers’ discussion of respect

is connected to concerns about harm. Chambers' argument about respect suggests that respecting women requires us to prevent them from inflicting harm on themselves, at least if that harm is the product of a discriminatory social norm. Assuming that risky illegal alternatives can be kept at bay, prohibiting breast implants might be an effective way of protecting women from the physical, status, and economic harm that this procedure involves. I will refer to these harms as *harms of compliance*. Yet, as argued in Section 2, the harms that are caused by the social norm underlying breast implants go beyond the physical, status, and economic harm of having breast implant surgery. They also include psychological harm, such as the internalised feeling of inadequacy that is apparently pressing enough to make a painful and dangerous surgery an attractive option for many women; and economic and professional harm in cases where one's professional success is impeded by not conforming to the norm. I will refer to these harms as *harms of non-compliance*.

Chambers acknowledges harms of compliance and harms of non-compliance as relevant in the argument about prohibition (Chambers 2008, 210). Yet, her argument about respect focusses on the harms of compliance (mostly physical harm and status harm) and largely neglects the effect prohibition might have with regard to the harms of non-compliance. On Chambers' account, respecting women requires protecting them from the harms of compliance by legally preventing them from having breast implants. As the discussion in Section 3.2 suggests, this strategy has troublesome effects. Prohibiting women from undertaking breast implants will soothe neither the psychological, nor the economic or professional harm that they hoped to alleviate by having breast implant surgery. Instead, it forces women to confront these harms against their own choice for as long as the norm remains effective—a period which, as I have argued, might stretch over several decades. As a result, Chambers' suggestion for how to best respect women involves exposing them to the harms of non-compliance which, judging from their sincere desire for surgery, for them seems to constitute the greater of two evils.

Take a moment to note the crucial role of the argument about respect in justifying prohibition. From a merely instrumental perspective, prohibition would effectively expose some women against their own choice to psychological, professional, and economic harm in order to improve the situation for future generations of women. This justification, I argued, is problematic because it effectively suggests ending a form of oppression at the cost of the oppressed. But if Chambers succeeds in providing an alternative, constitutive justification, according to which protecting-

women from the harms of compliance is a necessary requirement for respecting them, even at the costs of exposing them to the harms of non-compliance against their own will, the problem above loses its force.

However, it is not obvious that Chambers' way of negotiating the different kinds of norm-induced harms is the only, let alone the best, way to provide respect for women who are affected by discriminatory social norms. Respecting women may require us to equally protect them from *all* the unjust harms that the norm inflicts on them, or to protect them first of all from those harms that *they themselves* judge to be the most pressing ones. Thus, an objection to Chambers' account of respect would say that the very fact that many women decide to have breast implants in spite of the harm the procedure involves, demonstrates that Chambers is focussing on the wrong sort of harms. These women, so the argument goes, disagree with Chambers' understanding of what it means to respect them. Their decision bears evidence that *for them*, the psychological, economic, or professional harms of non-compliance are of more pressing concern than the physical and status (and economic) harms of compliance. To them, the choice to have breast implants might be an act of self-care in unfavourable circumstances, even if it amounts to nothing more than trading one set of unjust harms for another. Prohibition, by contrast, not only deprives these women of authority over a decision with regard to their own bodies, but ignores that, from their own perspective, the physical and status harm of breast surgery might be a less humiliating and painful experience than non-conformity with the harmful norm.

To this, Chambers could respond that most women's decision to have breast implants may not correctly reflect their weighing up of *all* the different harms involved. Women who decide in favour of breast implants, she could argue, might be unaware of the status harm that undergoing surgery would inflict on them, because status harm is much more elusive than physical and economic harm. Unlike the physical and economic harms and risks of cosmetic breast surgery, status harm does not regularly feature on patient leaflets in cosmetic clinics, or appear among the top hits of an internet search for 'breast implants surgery.' Instead, status harm is often disguised and requires perspicacious social analysis to become visible. Most women who desire breast implants will therefore *not* be aware that this procedure involves complying with a harmful norm that casts them as inferiors. As a result, Chambers could object, a woman's choice to have breast implants is likely to be based on information that are incomplete in crucial respects, and should therefore not be understood as an informed decision that demands our respect.



However, the fact that someone's decision to engage in a self-harming practice is based on their incomplete understanding of the harms involved does not usually suggest prohibition of the practice as a go-to remedy in the name of respect. Instead, it seems that our response for respecting individuals as desiring, choosing agents would be to ensure that all the relevant information is available to them. Hence, it seems that respecting women as desiring, choosing agents first of all requires providing them with information about the status harm that breast implants surgery involves. Moreover, insofar as a woman's decision to have breast implants is enforcing the harmful norm and is thus not only harming herself but also other women in the present and future, an informed decision should also require information about these negative externalities.

To this, Chambers might reply that a full understanding of the status harm and negative externalities involved in having breast implants is simply *incompatible* with the deliberate decision of having them. She could argue that a woman cannot at the same time be aware that breast implants cast her, and other women who feel compelled to having them, as an inferior object of male sexual desire and yet believe that having breast implants is a prudent thing to do in her situation. A woman's decision to have breast implants, Chambers could argue, can *only* be a symptom of her having internalised the idea that women with natural breasts are indeed inadequate. Hence, Chambers might object, there is no need to have women reconsider their decision about breast implants in the light of information about status harm, because we already know what their decision will be.

There are several ways to respond to this. First, one could insist that allowing women to make an informed decision based on information about all the relevant harms is nevertheless a requirement of respect in this situation—hence, that respecting women as desiring, choosing agents requires us to provide them with resources to critically reassess their decision, even if we could already be sure what the outcome of that reassessment will be. Second, one could argue that women's reasons for having breast implants, and the meaning of that decision, might be more nuanced and reasoned than the above objection admits. Women may fully understand and oppose the harmful norm that requires them to have breast implants and yet feel that having breast implants is, all things considered, the most prudent option in their situation. Chambers would certainly agree that understanding and opposing harmful, discriminatory social norms does not prevent women from being affected by them. Hence, a woman might be fully aware of the problematic nature of her nagging feeling of

inadequacy with natural breasts. Yet, she might find the feeling hurtful and distracting; or she might find that dealing with it on a daily basis is simply taking too much of her time and energy—time and energy that could be more productively spent on a career in science, or, as it were, on plotting a feminist revolution that will eradicate these concerns for good. In either case, the woman's decision to have breast implants would not express a naïve endorsement of the norm that motivates it. It would rather be a costly but reasoned compromise which negotiates the burdens of the norm in a way that best allows her to realise her personal goals and values. Furthermore, since the decision to have breast implants is first of all a matter of women's authority over their own bodies, respecting women requires that we leave it up to themselves how to weigh the problem of negative externalities into that decision.

As a result, we can agree with Chambers that respecting women requires altering the social reality that leads them to desire breast implants, and at the same time object to the idea that we should prohibit women from acting on that desire. Instead, providing women with respect requires that we make them aware of what precisely they are buying into when opting for cosmetic breast augmentation. Now, after re-considering their decision critically, and recognizing the harms that confront them either way, they might still come to the conclusion that having breast implants is overall the most prudent thing to do. That very decision would also be evidence for the fact that women are not willing or able to make the sacrifice Chambers' proposal asks them to make in order to speed up the norm-eliminating social process leading to a better future for other women. One might still hold that this choice would be lacking in self-respect or egotistic. But to prohibit breast implants, and hence to force women to face the harms of non-compliance against their own judgement, is to further disrespect them as desiring, choosing agents. As a result, the only appropriate reaction, in the name of respect for women, is to continue to criticise and challenge the disrespectful circumstances which make this choice an attractive one in the first place.

#### 4. AN ALTERNATIVE PROPOSAL

The discussion of Chambers' proposal illustrates how trying to address the problem of harmful, discriminatory social norms pulls us in opposite directions. The reason for that, I have argued, is the twofold moral obligation posed by the existence of these norms. While the obligation to eliminate the harmful norm calls for

powerful measures of undermining it, which might additionally burden those who already suffer most under the norm, the obligation to address the ongoing norm-induced harm requires that we, at best, alleviate these harms immediately, and, at least, refrain from worsening the situation for women affected by them. Chambers' proposal, in principle, recognizes not only the first, but also the second moral obligation. On these grounds, we should expect her proposal to be an improvement upon conventional measures for addressing harmful social norms. Yet, a closer discussion of the details of Chambers' defence revealed substantial problems which reflect the tension between the two moral obligations. Even if prohibition is a powerful tool for undermining social norms that motivate a self-harming practice like breast implants – which, I argued, is uncertain – it might come at significant costs to the individuals who are affected by it: Chambers can neither refute the charge that her proposal might contradict rather than enforce women's preferences, nor demonstrate that prohibition is a requirement, or even a good way, of respecting women. As a result, her defence of prohibition is either unconvincing (as a requirement of respecting women), or unduly sacrifices the second moral obligation in favour of the first by effectively proposing to fight oppression at the costs of those currently oppressed (as a means to undermine the harmful norm). Overall, prohibition is then not a good way to address the twofold moral obligation entailed by harmful and discriminatory social norms, at least in the case of breast implants. In the remainder, I develop an alternative proposal based on four desiderata that aim to avoid the problems of Chambers' proposal. Note that, like prohibition, this proposal should not be understood as replacing conventional measures like education and media regulations. Instead, it is meant to serve a complimentary role that takes into account the second moral obligation which conventional measures tend to neglect.

In the previous discussion, I have identified four main problems of Chambers' proposal that ought to be avoided by a better alternative. First, prohibition disregards women's own informed judgement as to whether or not they should have breast implant surgery, hence disrespects them as desiring, choosing agents. Second, while (compulsorily) protecting women from the harms of compliance, prohibition does not address the harms of non-compliance, but instead might effectively expose women to these against their own choice. Third, prohibition risks promoting social change in an unjust way by undermining a harmful norm largely at the costs of those affected by it. Fourth, effectively, prohibition is biased in favour of the first moral obligation while neglecting the second. Against this background, I propose the fol-

lowing four desiderata for an alternative proposal. The alternative proposal should, first of all, make the decision to have breast implants a matter of *truly informed consent*. While the ultimate decision about having breast implants ought to remain with the individual woman, she needs to make that decision in light of knowledge about the discriminatory and objectifying nature of this practice. Second, the proposal should acknowledge *both* kinds of norm-induced harms, harms of compliance and harms of non-compliance, as collective wrongdoings against women which. This means that, until both kinds of harms are prevented, women are owed recognition and redress for having been wrongfully harmed by society. Third, since the existence of the harmful social norm constitutes a *collective* wrongdoing against women, the proposal needs to distribute the costs for social change and redress collectively, or at the very least has to refrain from imposing the lion's share on the affected women. Fourth, the proposal needs to attend adequately to both moral obligations and not unduly neglect one in favour of the other.

How do we implement these desiderata? With regard to the first desideratum, the matter seems to be quite straightforward. In addition to education campaigns that raise general awareness of the discriminatory and objectifying nature of the practice of breast implants, the relevant information could be specifically communicated as part of the physician-patient-consultation, or on the medical consent form that patients are required to sign before breast implant surgery. The relevant information would not only include reference to the status harm that having breast implants might entail, but could also feature information about the harmful effects breast implants might have on other women by increasing the acceptance and influence of the relevant norm.

The second desideratum requires addressing both kinds of unjust harms that are inflicted by the social norm, harms of compliance and harms of non-compliance. The discussion of prohibition suggests that, unless the harmful norm is fully eliminated, it is in practice impossible to prevent women from being exposed to either one or the other. As with other cases where an agent (individual or, as assumed in this case, collective) is responsible for wrongfully harming someone, the agent is obliged to provide some form of redress to the victim. If we assume that a society, by maintaining harmful norms, wrongfully inflicts these harms on women, members of the society would thus face a collective liability to redress the affected women. According to this idea, women would be entitled to compensation for the unjust harms they face due to the harmful social norm. One obvious way to implement such means

for redress would be to follow the common judicial practise of redressing not only economic and professional, but also physical and psychological harms by monetary means. Monetary compensations seems to be a very crude measure for redressing the diverse kinds of harms inflicted by the relevant social norm. Moreover, overestimating monetary compensation as a means to restore what women's life would have been without the degrading social norm might itself constitute a form of disrespect. Yet, despite its obvious shortcomings, monetary compensation might fulfil both a symbolic and a practical role in redressing the harms of the social norm. Symbolically, monetary compensation could at the very least express acknowledgment that the norm-induced harms are in fact a form of collective wrongdoing. In its practical role, monetary compensation could be used flexibly by each woman so as to best ameliorate the harm that the norm has caused her individually.

The idea of monetary redress may thus rightly invoke mixed feelings, and requires a more detailed discussion than I can provide here. Yet, in lack of a better alternative, I suggest we adopt it as a possible form of redress and consider in more detail what this suggestion would entail. With regard of harms of non-compliance, it would entail that women are entitled to compensation for the psychological, professional, or economic harms they suffer due to not conforming to the harmful norm. Yet, despite the option of monetary compensation for these harms of non-compliance (and their awareness of status harm) women might still opt in favour of complying with the harmful norm. How, adhering to the second desideratum of addressing the harms that occur either way, should we proceed in these cases? It seems that, if a society is responsible for facing women with the dilemma of choosing between the harms of complying and the harms of not complying with a certain social norm, it is responsible for the harms that it inflicts on women on either horn of the dilemma. Hence, the fact that a woman declines compensation and opts for surgery does not exculpate the society that maintains the norm which motivates the woman's decision from redressing the harms that she faces due to having the surgery. If anything, her decision is evidence that the crude attempts at monetarily mending the psychological, economic, or professional harms are insufficient. As a result, the harms that she is facing due to the surgery are equally unjustly inflicted on her by society, hence equally mandate compensation.<sup>3</sup> This would entail that women who decide to have

3. Since I believe that the idea of monetary compensation for status harm is absurd and self-defeating, the claim for compensation is meant to apply only to the physical and economic harms of compliance, leaving the problem of status harm unaddressed.

surgery are entitled to monetary compensation not only for the immediate and long-term physical harms they may suffer due to the operation, but also for the costs of the operation itself, as well as any related costs of medical treatment. In other words, the second desideratum of redressing the unjust harms of social norms effectively requires that we subsidize breast implant surgery. This has implications with regard to the fourth desideratum which will be discussed below.

Before that, consider briefly the third desideratum, which demands that the costs for undermining a harmful social norm be borne collectively, or at least do not disproportionately burden those affected by the norm. The alternative proposal developed here is meant to compliment education campaigns and media and advertisement regulations with compensation payments for norm-induced harms. Insofar as all of these measures are financed collectively by the society that maintains the harmful norm, and do not impose further harms on affected women, this desideratum is fulfilled.

With regard to the fourth desideratum, which requires an adequate balancing of the obligation to undermine the harmful norm on the one hand, and the obligation to address the ongoing harming of women on the other, the situation is a little more complex. While the conventional measures, as argued above, primarily target the first moral obligation, the compensation payments for norm-induced harm are meant to target the second moral obligation. Unfortunately, we can again identify a problematic tension between these two parts of the alternative proposal. This is not so much the case with the compensation payments for harms of non-compliance. To the contrary, as a welcome side effect, they are likely to decrease the incentives for having breast implants, hence support conventional measures in undermining the norm. But there is a conflict with regard to compensation payments for harms of compliance, i.e. with regard to the subsidy and compensations for breast implant surgery. These monetary compensations for the harms of compliance are likely to encourage women to have breast implants, hence contradicting the first moral obligation.

It is important to distinguish several scenarios of how the compensations might achieve this, for not all of them are equally problematic. For one thing, these compensations could allow women who firmly desire to have breast implants but cannot afford them to act on that desire. On this understanding, compensation for the harms of compliance constitutes not so much an encouragement to undertake breast surgery but removes a decisive financial obstacle faced by some women. However, this aspect seems to be a desirable feature of the subsidy and compensation proposal

for it provides poor women with the same choice as more wealthy women. It thus enables all women to escape the psychological, economic, or professional harms of non-compliance via surgery given that their informed judgement is that this is the best choice for them.

At the same time, insofar as a subsidy and compensation payments for breast implant surgery increases the total number of women who have the surgery, there is a risk that having breast implants becomes more commonplace and acceptable. As a result, the harmful norm would become even more powerful and the pressure on women to have the surgery would increase. Finally, compensations for the harms of breast implant surgery would communicate what Chambers' fears legalisation of breast implants communicates: that the harmful norm underlying the decision to have breast implants is worthy of respect, and that women's feelings of inadequacy about their bodies are appropriate and require a surgical, rather than social, intervention. The latter two scenarios both describe ways in which compensation payments for harms of compliance, in trying to address the injustice imposed by a harmful norm, work against the long-term goal of undermining the norm. Subsidy and compensation payments may increase the norm's power by making breast surgery more acceptable or required, or they may strengthen the norm by communicating that it is worthy of respect.

As a result, an alternative proposal that includes subsidies and compensation payments for having breast implants would fulfil the first three desiderata: it would make breast implant surgery a matter of informed consent; it would redress both kinds of norm-induced unjust harms, and it would distribute the costs for undermining the norm and redressing its unjust harms in a collective way. However, by increasing the respectability and acceptability of breast implants surgery, this proposal would make the harmful norm even more powerful and hence undermine the long-term goal of eliminating it. The proposal, then, would fail with respect to the fourth desideratum, because its attempts at addressing the harms of compliance would unduly compromise the first moral obligation to eliminate the norm. In conclusion, a suitable alternative to prohibition would combine education campaigns and media regulations with compensation payments for the harms of non-compliance, but would need to refrain from subsidising and compensating having breast implants.

## 5. CONCLUSION

Despite its nominal acknowledgement of the twofold moral obligation with regard to harmful and discriminatory social norms, prohibition, I argued, overall does not provide a good way to respond to both obligations. It constitutes either a problematic form of paternalism, a misguided way of respecting women as desiring, choosing agents, or undermines a harmful norm at the cost of those affected by it. Instead, I showed, a combination of education campaigns and media regulations together with a system of compensation payments for harms of non-compliance provides the best way to address both moral obligations in combination.

*Acknowledgements: This paper has benefited enormously from insightful discussion with and comments from Tom Sinclair, Maxime Lepoutre, Cecile Fabre, the participants of the Political Theory Research Seminar MT 2014/15 in Oxford, the participants of the GAP.9 Conference 2015 in Osnabrück, as well as one anonymous reviewer of the Uehiro Prize for Practical Ethics.*

## REFERENCES

- Arneson, Richard J. (1980): 'Mill versus Paternalism.' *Ethics* 90 (4), 470-489.
- Chambers, Clare (2008): *Sex, culture, and justice. The limits of choice*. University Park: Pennsylvania State University Press.
- May, Larry. & Robert Strikwerda (1994): 'Men in Groups: Collective Responsibility for Rape,' *Hypatia* 9, 134-151.
- Scoccia, Danny (1990): 'Paternalism and Respect for Autonomy.' *Ethics* 100 (2), 318-334.
- Sunstein, Cass R. (1991): 'Preferences and politics.' *Philosophy & Public Affairs* 20, 3-34.
- Thaler, Richard H. & Cass R. Sunstein (2008): *Nudge: Improving decisions about health, wealth, and happiness*. London: Yale University Press.



# How Should Vegans Live?

XAVIER COHEN

*University of Oxford*

## ABSTRACT

In this essay, I look at the significant portion of vegans who are vegan because they care about harm to animals. I investigate what lifestyle is in fact consistent with caring about harm to animals, which I begin by calling consistent veganism. I argue that the lifestyle that consistently follows from this underlying conviction behind many people's veganism is in fact distinct from a vegan lifestyle.



Ethical vegans make a concerted lifestyle choice based on ethical—rather than, say, dietary—concerns. But what are the ethical concerns that lead them to practise veganism? In this essay, I focus exclusively on that significant portion of vegans who believe consuming foods that contain animal products to be wrong *because they care about harm to animals*, perhaps insofar as they have rights, perhaps just because they are sentient beings who can suffer, or perhaps for some other reason.<sup>1</sup> Throughout the essay, I take this conviction as a given, that is, I do not evaluate it, but instead investigate what lifestyle is in fact consistent with caring about harm to animals, which I will begin by calling *consistent veganism*. I argue that the lifestyle that consistently follows from this underlying conviction behind many people's veganism is in fact distinct from a vegan lifestyle.

Let us also begin by interpreting veganism in the way that many vegans—and most who are aware of veganism—would: a vegan consumes a diet containing no animal products. In conceiving of veganism in terms of what a diet *contains*, there seems to be an intuition about the moral relevance of *directness*, according to which it

1. One may interpret 'harm' in different ways. The deontologist can read harm as denoting the violating of rights or snubbing of duties, and consequentialists can interpret 'harm' in terms of the good.

matters how direct the harm caused by the consumption of the food is with regards to the consumption of the food. On this intuition, eating a piece of meat is worse than eating a certain amount of apples grown with pesticides that causes the same amount of harm, because the harm in the first case seems to be more directly related to the consumption of the food than in the second case.<sup>2</sup> Harm from the pesticides seems to be a side-effect of eating the food, whereas the death of the animal for meat seems to be a means to the eating food. Even if we grant this intuition to be a good in this case, it is not good in the case where the harm is greater from the apples than from the meat. To eat the apples in this case is to not put one's care about harm to animals first, which means going against the only thing that should motivate a consistent vegan.<sup>3</sup> Here, our intuition about the amount of harm caused is what seems to matter; if what we care about is harm to animals, then we should cause less rather than more harm to animals, and therefore, from the moral point of view, it seems that it is better to eat the meat than the apples. Let the conviction in this intuition be called the 'less-is-best' thesis. Therefore, the intuition about the directness of the harm is only potentially relevant in situations where one has to choose between alternatives that cause the same amount of harm, or in situations where one does not know which causes more harm. The rest of the time, it seems that consistent vegans should not care about the directness of the harm, but instead care only about causing less rather than more harm to animals. This requires an awareness of harm that extends further than relatively common considerations noted by vegans regarding animal products being used in the production process for—but not being contained in—foodstuffs like alcoholic drinks. Caring about harm to animals means caring about, less directly, accidental harm to (usually very small) animals from the harvesting process, and from products that have a significant carbon footprint, and thereby contribute to (and worsen) climate change, which is already starting to lead to countless deaths and harm to animals worldwide.

However, caring about harm to animals cannot plausibly require consistent vegans to cause no harm at all to animals. If it did, then in light of the last two examples given above, it seems it would require consistent veganism to be a particularly ascetic kind of prehistoric or Robinson Crusoe-type lifestyle, which would clearly be far too demanding. In fact, it is probably the case that one cannot live without

2. Let us assume that the apples and meat are of the same nutritional value to control for any intuitions about preserving one's health.

3. Let us assume, for the sake of simplicity, that caring about harm to animals is the only ethical concern that consistent vegans have.

causing harm to animals due to the trade-off in welfare between other animals who are harmed by one's own consumption, and oneself (an animal) who is harmed if one cannot consume what one needs to survive. But it is definitely the case that all humans could not survive if no harm to other animals could be caused; this means that either human animals or non-human animals will be harmed regardless of how we live. We could not all be morally obligated to live in such a way that we could not in fact all live. Therefore, due to this argument and due to such a lifestyle being over-demanding, there are two sufficient arguments for why causing some harm to animals is morally permissible.

If it is the case that causing some harm to animals is morally permissible, then there is no clear reason why there should be a categorical difference in the moral status of acts—such as impermissibility, permissibility, and obligation—with regards to how they harm animals, apart from when these categorical differences arise only from vast differences in the amount of harm caused by different acts. So, for example, shooting a vast number of animals merely for the pleasure of sport may well be impermissible, but only insofar as it causes a much greater amount of harm than alternative acts that one could reasonably do instead of hunting. It seems that the most reasonable position, then, which is in line with the less-is-best thesis, is that the morality of harm to animals is best viewed on a continuum on which causing less harm to animals is morally better and causing more harm to animals is morally worse, where the difference in morality is linked only to the difference in the amount of harm to animals.

Hitherto, I have said that it seems to be the case that consistent vegans care about causing less rather than more harm to animals. However, I claim that the less-is-best thesis should in fact be interpreted as having a wider application than merely harm *caused by* our actions or life lived. One's care for animals should be further-reaching: rather than merely caring about harm one causes, a consistent vegan should care about acting or living in a way that leads to less rather than more harm to animals. The latter includes a concern about harm caused by others that one can prevent, which the former excludes as it is not harm caused by oneself.

The impact of social interaction on people's lifestyles is an important way in which consistent vegans can act or live in a way that leads to less rather than more harm to animals. That nearly all vegans are in fact vegans because they were previously introduced to vegan ideas by others—rather than coming by them and becoming vegan through sheer introspection—is testimony to the impact of social inter-

action on people's lifestyles, which in turn can be more or less harmful to animals. Consistent vegans have the potential to build a broad social movement that encourages many others to lead lives that cause less harm to animals. But in order to do this, consistent vegans will have to persuade those who do not care about harm to animals (or let care about harm to animals impact their lifestyle) to lead a different kind of lifestyle, and if this recommended lifestyle is too demanding, many will reject it or simply not change, meaning that these people will continue to harm animals. If these people are more likely to make lifestyle changes if the lifestyle suggested to them is less demanding, which for many—and probably a vast majority—will be the case, then consistent vegans could bring about less harm to animals if they try to persuade these people to live lifestyles that optimally satisfy the trade-off between demandingness and personal<sup>4</sup> harm to animals. This lifestyle that consistent vegans should attempt to persuade others to follow I shall call environmentalism.

Why 'environmentalism'? And what is the content of environmentalism? Care about harm to animals can be framed in terms of care for the environment, as the environment is partially—and in a morally important way—constituted by animals. This can be easily—and I believe quite intuitively—communicated to those who do care about harm to animals, and those who do not are likely to be more swayed by arguments that are framed in terms of concern for the environment than for animals; concern for oneself, one's loved ones, and one's species—things that most people care greatly about—may be more easily read into the former than the latter, especially in light of impending climate change. Environmentalism, then, is the set of lifestyles that seek to reduce harm done to the environment (which is conceived in terms of harm to animals for consistent vegans)—as this matters morally for environmentalists—regardless of which sphere of life this reduction of harm comes from. Be it rational or not, ascribing the title and social institution of 'environmentalist' to one's life will, for many, make them more likely to lead a life that is more in line with caring about harm to animals; people often attach themselves to these titles, as the dogmatic behaviour of many vegans shows. Moreover, environmentalism can be practised to a more or less radical—and thus moral—extent. Some may prefer to reduce total harm to animals by a given amount by making the sacrifice of having a vegan diet, but not compromising on their regular car journey to work, or perhaps by

4. 'Personal' here refers to the impact of one's lifestyle on harm to animals apart from the impact on harm to animals one has through affecting others' lifestyles. This impact on others' lifestyles is factored in to the notion of demandingness: the lower the demandingness of the lifestyle suggested, the greater the 'multiplier effect' of take-up of the lifestyle by others.

opting out of what for them may be uncomfortable proselytising, whilst others may find taking on the latter two easier than maintaining the strict vegan diet (that they perhaps used to have). Some may reduce total harm by an even greater amount—and hence lead a morally better lifestyle—by having a vegan diet *and* by refraining from harmful transport *and* by actively suggesting environmentalism to others. As an environmentalist may begin by making very small changes, one can be welcomed into a social movement and be eased in to making further lifestyle changes over time, rather than being put off by the strictness of veganism or the antagonism typical of some vegans. Environmentalism has the great advantage of making it easier for the many who cannot face the idea of never eating animal products again to live more ethically-driven lives.

It follows from all this, then, that consistent vegans should be (especially stringent) environmentalists. For the given impact they have on the total harm to animals, it does not matter if this comes from a totally vegan diet. In fact, to be fixated on dietary purity to the neglect of other spheres of one's life—in the way that many vegans are—is to contradict a care about harms to animals. With this care given, what matters is lowering the level of harm to animals, regardless of how this harm is done.

*Acknowledgements: I am grateful to my friends Guanlan Mao and Claudia Hogg-Blake for their comments on an early version of this essay, and of course to the Oxford Uehiro Centre for Practical Ethics for running the competition and a fantastic event at which this essay was presented. I would also like to thank all the judges and audience members for their insightful comments, and in particular Roger Crisp, who marked the essay for the first stage of the competition, for leaving me very helpful comments.*