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On Politics

On Politics is a peer-reviewed academic journal published biannually by the University of Victoria Undergraduates of Political Science. It aims to encourage and facilitate undergraduate scholarship by providing students with a unique opportunity to have their work published in a formal medium. The editors of *On Politics* are drawn from the undergraduate student body and the journal publishes writing from a variety of theoretical perspectives, both intra- and interdisciplinary.

Submissions

Articles may be submitted by any undergraduate student at the University of Victoria. Submissions should be eight to fifteen pages in length and must have received a grade of A- or higher. Citations must consist of footnotes conforming to the *Chicago Manual of Style*. All submissions should be directed to the Editor in Chief at onpol@uvic.ca and will be subject to a double-blind review by the Journal's undergraduate editorial staff. For more information go to: https://www.facebook.com/onpoliticsuvic/.

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Letter from the Editor

It has been a troubling year for politics. Since our last issue in the spring of 2017, the international political landscape has shifted dramatically due to institutional fear, power vacuums, and the spread of popular nationalist sentiments across the globe. The world, of course, has always been one of change and tumult, however, with the ever-increasing prevalence of domestic and international news engulfing our screens and conversations, we are forced to grapple with the latest developments in the world of politics on a daily basis.

Yet it is this kind of turbulence that necessitates the work of journals like *On Politics*—which continues to celebrate the exceptional undergraduate scholarship at the University of Victoria.

It has been a pleasure to put this journal together and we would like to thank all those from our editorial team — Malcolm Stewart, Samuel McVicar, and Xaviere Schneider — the professors who helped — Dr. Simon Glezos, Dr. Marlea Clarke, Dr. Andrew Wender — as well as our contributors for their hard work and patience. With that, we are pleased to present to you the Fall 2017 edition of On Politics.

Thank you for reading this copy of the journal. We hope you enjoy.

Declan Roberts and Elena Trenholm
Co-Editors in Chief

Co-Editors in Chief

Declan Roberts is a double major student in Politics and English Literature focussing on the European Union and the Harlem Renaissance respectively. Declan has worked on successful campaigns for both federal and provincial elections and is currently working on a provincial campaign for universal access to free prescription birth control.

Elena Trenholm is in her fourth and final year of a B.A. in Political Science. Her field of focus is international development with an emphasis on European neighbourhood policy. Elena has worked previously with Democracy Reporting International, and is currently a programme assistant with University 101.

Editors

Malcolm Stewart is currently completing a double-major in History and Politics. His work has been published by both *The Corvette* and *On Politics*, and he has subsequently served on both editorial boards. The latter publication was an analysis of modern mercenaries in international law.

Samuel McVicar is a third-year double-major studying Political Science and Journalism. Samuel's area of research is international relations; he has previously published work on the development of al-Qaeda in the Middle East and currently works with a student-run news organization.

Xaviere Schneider is a third year Political Science major and English minor student with a focus in comparative politics and voting patterns. Xaviere has worked with Elections Canada for provincial and federal elections and is interested in pursuing Environmental Law.

Contributors

Sarah Broitman is in the fourth and final year of her B.A. in Political Science and Applied Ethics. Having studied and worked abroad, she is greatly interested in international affairs and migration policy, focusing the majority of her research in the context of the European Union.

Riley Sun is in the fourth and final year of her B.A. in Political Science and Communications. Over the course of her undergrad, she has become particularly enthralled with constitutionalism, social policy analysis, citizenship and identity politics. Riley will be spending her final semester in France studying at Sciences Po.

Myim Bakan Kline is a Political Science honours student. He focuses on the Canadian health care system, as well as on investor-state dispute settlement regimes and arbitration. Myim is in his second term as the president of UVic's Model United Nations club.

Jacob Noseworthy is a second-year Political Science student with an interest in Canadian politics and electoral systems. Jacob is active in federal and provincial politics. This is the second paper Jacob has published in *On Politics*.

Jonathan Carroll is a fourth-year Political Science student, with a minor in Economics. His primary focus is domestic government, and particularly the role of local levels of government in shaping the Canadian policy landscape. Jonathan has been involved in municipal, provincial, and federal elections.

Forward

One of the main challenges that students of political science face is that they have to try to understand a world that is constantly changing. This has rarely been clearer than in recent years. Events from the Russian invasion of Ukraine, to the 2015 refugee crisis, to the election of Donald Trump have challenged many of the existing norms in both domestic and international politics in ways that are often quite troubling. Students of political science at every level and in almost every field face a significant challenge in trying to understand these changes and the effects that they will have on the way we do politics. Each of the papers in this issue addresses an important subject matter in understanding this changing political world.

It is fitting that this issue opens with two papers on immigration and multiculturalism. Countries in both Europe and North America are becoming increasingly diverse. This has made understanding governments' policy responses to cultural diversity all the more important. In examining German multiculturalism, Sarah Broitman addresses a case that is becoming more and more important in debates over government responses to diversity. Chancellor Angela Merkel's 2010 comments arguing that multiculturalism had failed in Germany has made the country a prominent case for academics, journalists, and pundits arguing the world is retreating from multiculturalism. This makes it important to carefully consider the way the German government has understood multiculturalism and the way that they have measured its success.

Riley Sun's paper tackles a similarly important and interesting subject in the education of migrants in Germany and the Netherlands. Through the 1980s the Netherlands was often considered one of the more multicultural countries in Europe while Germany was considered to have a very restrictive immigration policy. A retreat from multiculturalism in the Netherlands over two decades coupled with contentious reforms to immigration policy in Germany may mean that it is time to start rethinking our understandings of both countries. An examination of education rights in both countries plays an important role in this.

By focusing on both healthcare and the constitution, Myim Bakan Klein examines two issues that are ever present in Canadian politics. Since the adoption of the Charter of Rights and Freedoms in 1982, the Canadian courts have had an increasingly important role in policy making. As such, the way that the Courts interpret different provisions of the Charter, particularly with respect to the greater weight that they give negative rights, is of constant importance to Canadian politics.

The last three decades have seen dramatic changes to the Israeli party system. Since 1990 the country has seen declines in the overall vote share won by the two largest parties, Likud and Labour, the rise and fall of the centrist Kadima, and the emergence and growth of a number of extremist parties including Israel Our Home (Yisrael Beytenu) and the Jewish Home party. In such a political environment, understanding the impact of Israel's permissive proportional representation electoral system is

essential, something highlighted in Jacob Noseworthy's paper.

The changes that we have seen in world politics in recent years make distinguishing between practical and principled arguments all the more important. In such a world, it is worth revisiting work by Machiavelli and considering the extent to which he separates what he sees as practical and what he sees as normatively good. In this vein, Jonathan Carroll's paper touches on a subject that has implications not only for the way that we understand Machiavelli but also for the broader sense in which we look at principle and practicality in politics.

The papers included in this issue thus touch on a number of areas that are of a great deal of importance to modern politics. They demonstrate students' high level of engagement with the challenges being presented by a changing world.

Dr. Daniel Westlake
Assistant Teaching Professor, University of Victoria

The Myth of Multiculturalism
Germany's 'Failure' Contextualized

Sarah Broitman

"Multiculturalism has utterly failed," stated German Chancellor Angela Merkel in an infamous speech to the Christian Democratic Union Party.[1] Her speech in 2010 declaring the death of multiculturalism was one of the first of its kind, but would certainly not be the last. Preceded by the public rejection of multiculturalism by both the Netherlands and the United Kingdom, it was clear that something was incompatible between the multicultural model and European nations. Besmirched by the affiliation with ethnic separatism and radicalization, multiculturalism quickly attained a negative reputation within western Europe and in itself became a dirty word. The backlash of multiculturalism became common political discourse and fuel for assimilationist parties to evoke fear in the electoral masses. Considering multiculturalism's success in other nations, most notably Canada, it is curious why it was so quickly deemed such a trainwreck in Europe. This study will be focusing solely on the case study of Germany for ease of analysis and brevity. This essay will argue that multiculturalism was only perceived to have failed in Germany because integration was being measured by assimilationist standards. This thesis is supported by beginning with a brief contextual summary, then moving onto analyzing the measures Germany took to adopt a two-way integration system; and finally, by demystifying the backlash (or lack thereof) created in its wake. Further, it is

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[1] Matthew Weaver, "Angela Merkel: German multiculturalism has 'utterly failed'," *Guardian,* 17 October 2010.

shown that it is these conditions combined with contrived implementation that led to the dramatized failure of multiculturalism in Germany. This essay will argue that multiculturalism is in itself not a terrible model, but that when improperly implemented or judged by goals it is not meant to achieve, such as in the case of Germany, it is counterproductive to its core goal of unity through diversity.

Germany has historically boasted a maxim of non-immigration. Until the early 1970's, the German state maintained that it was not a country of immigration, despite rocketing levels of foreign-born populations living and working within its national borders.[2] Much of this denial is rooted in a long history of fairly low levels of immigration, with any significant migratory flows being outward. Seeing as what is now the modern German state has long had a heavily homogenous population, creating a cohesive national identity for migrants to aspire and conform to was never an issue. For most of its history, Germany and its predecessor polities experienced primarily intra-European migration with many of its immigrants hailing from countries such as Italy.[3] This immigration generally trickled in relatively slowly: meaning there were not large influxes of non-nationals of a similar ethnic background at the same time. This might seem redundant to point out, but this slow, even immigration pattern rather likely formed the social understanding Germans hold on what an immigrant should do and what it means to integrate. For example, the small amount of Italians

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[2] Christian Joppke, *Immigration and the nation-state: the United States, Germany, and Great Britain* (New York: Oxford University Press, 1999), 62-63.

[3] Stephen Castles, Hein de Haas, and Mark J. Miller. *The age of migration: International population movements in the modern world* (New York: Guilford Press, 2014), 93.

entering Germany pre-World War II were unlikely to form an ethnic minority and live in a separate ghetto, mainly because it was statistically incompatible with how many Italian-Germans would have been in one city at a time. Castles, De Haas, and Miller have stated that most migrants adopted German traditions quickly and were keen to become one with the national norm.[4] This supports the presumption that German society would likely view integration and assimilation as nearly identical — or at the very least heavily associate the two terms. It will become rather clear when contrasted with later policies under their pseudo-multicultural model that migrants were perceived to have so poorly integrated due to the way in which integration was being measured and understood by the general public.

After World War II, Germany required many workers to fill the factory floors as the world's economies began to rebuild and prosper. The Federal Republic of Germany (FRG, also known as West Germany), became somewhat of a model for other nations with its novel guest worker program. This program was designed to draw in low- and semi-skilled workers from neighbouring nations on a temporary basis. Employers requested workers from the federal guest worker program and in return sponsored said workers for a set term. The problem however that struck Germany was that many migrants were not leaving after their work term. In reaction, the German government tightened policies aiming to deport any migrant at the smallest offence, but still the masses poured in. As time went on, the previously strict labour migration diversified into familial reunification migration and economic migration. Many guestworkers found loopholes by having their employer request their spouse as a worker from the

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[4] Castles, de Haas, and Miller, *The age of migration*, 84-101.

federal program, thus avoiding the strong resistance towards the familial reunification form of migrant admittance exerted by the German state.[5] Following this trend, families that were reunited began creating new types of non-national German residents in their children. Though they were not automatically granted citizenship due to Germany's *ius sanguinis* requirements, the German government would later be more sympathetic to these second-generation migrants as they saw them as more integrated — having already cut ties with their ancestors' homeland.[6] The guestworker program eventually came to an end in 1973, but the large immigrant population would remain and continue to grow. A significant portion of these migrants were of Turkish descent. Their culture being drastically different from Germany's lead to ethnic separation, and the German-Turk population became heavily scrutinized and politicized as time went on. Germany decided to adopt multicultural measures to address the integration of their migrant society, and when this was implemented many gauged this on how well it could handle the "Turkish problem." A hostile relationship steadily grew between German nationals and their mainly Muslim Turkish counterparts. This relationship is crucial in helping to explain the obvious ineffectiveness of certain policies, in the following section; this essay then moves on to use the social understanding of integration the essay establishes above to explain why the multicultural model was perceived as such a failure later on.

Germany never officially adopted a multicultural national model but clearly tried to implement one through specific policy measures. Merkel's public declaration of multiculturalism as being dead can be taken as an admission of such policies being undertaken at some point.

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[5] Castles, de Haas, and Miller, *The age of migration*, 107.
[6] Joppke, *Immigration and the nation-state*, 80-81.

Multiculturalism requires a certain level of commitment from a state for it to function, as is stated in its definition: multiculturalism is defined as a two-way process in which both the nation and the migrant adapt to each other.[7] This can be implemented in a variety of ways and to different extents, but ultimately the nation must actively welcome change in order for this model to work. Additionally, one might note that under a model in which national change is to be expected, the definition of what it means to integrate successfully will be affected as well. If integration is *socially understood* as migrants assimilating into the national identity, but multicultural policies assert that the nation values the diversity and cultural background of migrants, an immediate dissonance is created in what the ideal outcome for migrants even is. Multiculturalism is frequently critiqued as failing to create a cohesive national identity, thus causing social segregation.[8] This critique seems to share the same definition of 'proper' integration, resembling a culturally stagnant homogenous national population which is more consistent with a one-way assimilationist model. But of course multiculturalism will be perceived as a failure if it is being measured using an antithetical model's standards. This shows that a nation is more likely to achieve success with a multicultural model if they both implement consistent policies and attitudes, as well as understand that success following a multicultural model will not resemble success in an assimilationist model.

This confusion could be even further amplified by conflicting federal and municipal provisions and unrepresentative policies, such as what occurred in Germany. In its attempts to adopt multiculturalism,

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[7] Castles, de Haas, and Miller, *The age of migration*, 270.
[8] Magdalena Lesińska, "The European backlash against immigration and multiculturalism," *Journal of Sociology* 50:1 (March 2014): 41-43.

Germany created a mismatched handful of policies to prove how 'inclusive' it was. Most notably, it utilized umbrella councils which were meant to represent large migrant groups' interests in parliament and other government bodies. The issue here is that in lumping migrants together, they often became misrepresented.[9] Germany also put in place an 'Office for Multicultural Affairs' which was primarily meant to address the unique needs of the large Islamic Turkish migrant population.[10] But that was it.

German analyst Maria Stehle has noted the superficiality of what Germany understood multiculturalism to mean. They were comfortable with a dark-eyed olive-skinned news broadcaster, but never one wearing a headscarf. They boasted an ethnically diverse World Cup soccer team, but continued to see its Muslim players as outsiders. Stehle and her colleague, Beverly Weber, theorized that perhaps the involvement of non-Caucasian players in the World Cup would help Germans associate positive patriotic feelings with a multicultural image.[11] Unfortunately, considering the tightening of immigration laws and citizenship requirements as well as the growing support for xenophobic parties like the Alternative for Germany, it seems Stehle's hope for a more accepting Germany has not yet been realized. Frank Decker notes that though the reasons voters support the Alternative for Germany are varied, the failed integration of migrants and refugees is marked for "paving the way for the entry of

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[9] Kenan Malik, "The Failure of Multiculturalism," *Foreign Affairs* 94:2 (March 2015): np; page numbers unavailable on online editions of article.
[10] Castles, de Haas, and Miller, *The age of migration*, 279.
[11] Maria Stehle and Beverly M. Weber, "German Soccer, the 2010 World Cup, and Multicultural Belonging," *German Studies Review* 36:1 (February 2013): 120.

right-wing populism into the discursive space."[12] Overall, Germany's lukewarm embrace of multiculturalism and its history of assimilation explains the ensuing backlash that took place.

As the rejection of multiculturalism became increasingly politicized, the concept of backlash seemed to gain serious traction within the media and general public. This term was often used to encompass all the horrible things that had come from Germany's brief period of half-heartedly attempting a two-way integration approach. The two primary problems critics claimed multiculturalism had left in its wake were those of radicalization and ethnic separatism. It is true that many Turkish-Germans have increasingly embraced Islam. They are the most consistently religious group in terms of mosque attendance in all of the Turkish community and over the past 20 years, the percentage of women who opted to wear headscarves has also increased.[13] This statistic is pointed to as a big 'red flag' of *shari'a* permeating through Germany's Muslim communities. This is enormously problematic in that it assumes that becoming more religious necessarily means becoming more radical. In a nation where immigrants face serious discrimination and hostility from the mainstream population, it is to be expected that they would turn to their religion for a sense of familiarity, community, and safety. Subscribing to the belief that Islam breeds radicalization and terrorism is harmful to the world as a whole and will only continue to create an unwelcome environment for migrants — leaving them only the mosque in which to seek shelter and solidarity.

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[12] Frank Decker, "The Alternative for Germany," *German Politics & Society* 34:2 (Summer 2016): 4.

[13] Malik, "The Failure of Multiculturalism," np.

In regards to ethnic separatism, many critics have argued that multiculturalism leads to the increased ghettoization of migrants and, in certain cases, the creation of parallel societies. But migrants living together in a specific neighbourhood is nothing out of the ordinary. Even after they have been accepted by the rest of the mainstream society and do not need to congregate in similar residential areas because of discrimination, they often continue to do so out of tradition and comfort — as is explained by Castles, De Haas, and Miller in the differentiation of the terms "ethnic community" and "ethnic minority." These ethnic communities often dissolve over time.[14] In Germany, this was actually perpetuated by the government itself. Over the period of its guest worker program, the government often placed many of the migrants in state-owned or state-subsidized housing.[15] Consequently, roots were set down there and it could be argued that the strong Turkish presence that still exists in these areas is merely out of convenience — and does not signify that the people living there are any less integrated than any others. Additionally, if one was truly concerned by migrants becoming reliant on parallel institutions within their own communities — for example a pregnant Turkish woman getting health services from the local midwife — multiculturalism, if anything, would solve this by removing the barriers that prevent her from visiting the state's own health facilities and professionals — who could provide her with strictly female staff so that she may remove her *hijab*. Patti Lenard, a scholar at the University of Ottawa, has argued that the backlash of multiculturalism perceived by host country nationals has been "greatly exaggerated" and its myth only further isolates migrants by creating hostility

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[14] Castles, de Haas, and Miller, *The age of migration*, 282.
[15] Ibid., 274.

between the national "us" and the non-national "them."[16] She notes this particularly in the case of Germany which, through its inconsistent integration policies, has created a permanent 'foreign' underclass within the nation.[17]

Germany simply did not succeed at multiculturalism, for it never fully embraced it as a model; it actually used the wrong criteria to measure its progress. It is clear that a genuine multicultural model is more complex than a few scattered actions by the state. For true success, multiculturalism requires time and populations willing to adapt. Just as it is ridiculous to judge a fish by its ability to jump, so too is judging multiculturalism by its ability to achieve assimilationist objectives rather nonsensical. Success in multiculturalism involves migrants both engaging in their new home country's culture while being free to maintain their own traditions. With nearly 15% of its population being foreign-born, Germany would be wise to rethink its quick dismissal of multiculturalism as a whole.[18] It is worthwhile to reflect on the fact that a Canadian RCMP officer wearing his turban is no less a patriotic man serving his country than his fellow officer sporting the usual helmet. It is by making small provisions such as these that a nation can make strides in multicultural integration and appreciate the beauty in diversity.

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[16] Patti Lenard, "The Reports of Multiculturalism's Death are Greatly Exaggerated," *Politics* 32:3 (October 2012): 186.
[17] Lenard, "The Reports of Multiculturalism's Death are Greatly Exaggerated," 188.
[18] Castles, de Haas, and Miller, *The age of migration*, 278.

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Beyond Semantics
Interpretations of EU Directives and Migrant Education

Riley Sun

Education is one of the most influential variables in the process of migrant education. The European Union, as a result, has made it one of its most prominent directives with the goal of creating continuity across the Union. But within the EU are countless diverse communities with different experiences, ideologies and practices. There is no definitive approach to education that would suit the needs of all these different states. The integration framework of a country is necessarily rooted in their different systems of government and community practices. Germany and the Netherlands illustrate two contrasting approaches to a migrant education framework that have produced similar results. There are pronounced differences in the way Germany and the Netherlands use education as a political tool depending on the outcomes they hope to foster and the communities they are trying to shape. A country's approach to integration and the assumptions each country makes towards its migrant populations deeply affects its policy making. The differences in the results speaks to the emphasis the two different countries put on different parts of their framework; where they focus their attention and resources. The similarities and relative success of each policy illustrates that there is no 'best practice' when it comes to education policy.

The EU has been working towards creating a consistent standard of living and welfare throughout the Union for everyone in it. A large part of this goal is how they have approached the subject of migrants, both regular and irregular. In 2004, the Union adopted a formal policy known as the Common Basic Principles of Immigrant Integration (CBP). The CBP is composed of eleven general

measures — each addressing different challenges concerning migrant — that must be worked into every member states' integration and immigration policy. This has set the ground for a unified approach on the rights and standard practices regarding incoming migrants. However, there is little to no mechanism to measure how these principles are worked into the policies of different countries. States interpret and implement these measures — both politically and socially — within their borders based on their own understandings of community dynamics and of migrants' place in that dynamic. The fifth CBP concerns immigrant access to education. The formal document articulates that "efforts in education are critical to preparing immigrants, and particularly their descendants, to be more successful and more active participants in society."[1] Its main objective is ensuring that immigrants and their right to basic education are adequately supported by the government.

Real integration is shaped by two parameters: the realm of ideas and the realm of institutions.[2] Education policy is an amalgamation of both. It builds and simultaneously is built by both ideas and institutions. It is an investment of the state; the more attention and support given to education, the more return in the form of effective citizens and economic momentum. Opportunities in schooling benefit migrants both as individual citizens and as a minority community.

Education is an integral part of integration because it shapes culture and societies. It promotes equality, social

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[1] European Commission, "Promoting Equity, Social Cohesion and Active Citizenship," 2015.

[2] Christian Joppke, "Transformation of Immigrant Integration: Civic Integration and Antidiscrimination in the Netherlands, France, and Germany." *World Politics* 59:2 (January 2007): 244.

cohesion, and active citizenship and can be used by a state in multiple ways. In particular, States use education to mold the type of citizen they idealize, in turn, building national identities. In this respect, it can be used in two opposing ways: to assimilate minorities or encourage cultural differences. Schooling can instill the core values of a society in its youth, eliminating difference from a malleable age, making it one of the most effective tools for assimilation. Conversely, school settings build community awareness by fostering and encouraging difference among their pupils. Educational institutions help establish a tolerance for diversity; students become more accustomed to it from a young age. This forms the base for a more multicultural and inclusive community.

Beyond shaping identities, education determines the growth of society. Adequate training affords migrants more opportunities to mobilize themselves and better their quality of life, simultaneously stimulating their host societies. The Council of Europe's Parliamentary Assembly released Resolution 1972 that enumerated the ways to ensure that migrants are a benefit for European host countries. Section 10.2 stated that "increasing their education levels and achievements so that they reflect more closely those of the total population" is a key way to maximise the benefits of integration as part of a two-way process.[3] Additionally, the Resolution proposed that states should challenge the misconceptions that portray migrants as being "a burden on public finances, and a threat to economic prosperity and social cohesion."[4] This can be done through education by the visibility and promotion of migrants in higher education. Also, education fosters brain

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[3] Parliamentary Assembly Council of Europe, "Resolution 1972: Ensuring that Migrants are a Benefit for European Host Societies," 2014.

[4] Ibid.

gain — when the opportunity for migration motivates more education in sending countries — and can effectively determine the socio-economic landscape of a country.[5] Emigration creates positive effect on education in both sending and receiving countries. Germany primarily uses education to mobilize their migrant population that is confined to the lowest levels of society. Access to education is not only beneficial to the migrants, ensuring upward mobility and further opportunities, it is a key benefit to the host society as a whole.

Education is also a securitization tool. Its demographic (children) are extremely susceptible to imposed influence. Thus, proper education can be used as a mechanism to prevent radicalization which is due in part to isolation, lack of participation, discrimination and lack of access to meaningful contacts within society.[6] The Netherlands have focused a lot of attention in preventing radicalization due to its Islamic extremist population. Though the actual support base is small, it is magnified by the socioeconomic standing of minority groups and their disassociation with the rest of Dutch society.[7]

In practice, states rarely subscribe to a clean-cut policy of either one or two-way integration processes. Thus, it is less abstract to examine the socio-political conditions of a state and how this has impacted their policy-making. Both countries are experiencing shifts in their immigration rates. This fluctuation is reflected in the changes in their respective approaches to integration. Since

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[5] Stephen Castles, Hein De Haas, and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World* (New York: Palgrave, 2013), 77.

[6] Chavi Nana, "With Strict Policies in Place, Dutch Discourse on Integration Becomes More Inclusive," *Migration Policy Institute* (April 2007).

[7] Ibid.

the 1960s, Germany has become one of Europe's top destination countries. In 2009, non-nationals accounted for approximately 8.8% of the total population; 15% of this population is under the age of seventeen.[8] Previous to this, the country held a strong belief that "Germany was not and should not be a country of immigration."[9] It was, and still remains a nation strongly defined by cultural-ties. This effectively emphasizes a sense of otherness towards *fremdvölkische* ("foreign people"). Despite this belief and the absence of concrete integration policies, they have still become renowned for legal and social capacity they grant their immigrants (though they are largely excluded from political rights).[10] Since World War II, their migration population is predominantly family migrants and former guest workers, though this is continuously diversifying. The predominantly low-skilled migrants are often scorned by the local population, and the school system in Germany does not support school children in the educational ladder to the necessary extent.[11] As a result, an underclass of people comprised largely of immigrants has manifested, further hindering their opportunities in schooling. Germany's integration policy is not a product of centralized policy design, but rather is a reactionary one. The Sussmuth Commission recommended Germany develop a more systematic approach to integration policy.[12] The successful integration of non-nationals in Germany is "discussed as a

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[8] EUROSTAT, "Population by educational attainment level, sex, age and citizenship," 2013.

[9] Peter Scholten, *Framing Immigrant Integration: Dutch Research-policy Dialogues in Comparative Perspective* (Amsterdam: Amsterdam University Press, 2011), 246.

[10] Scholten, *Framing Immigrant Integration*, 246.

[11] European Commission, "New Priorities for European Cooperation in Education and Training," (August 2015).

[12] Nana, "With Strict Policies in Place..."

function of their participation in the social and economic institutions of the welfare state, including in particular schools, professional training, and the labour market."[13] The country's strong welfare state is used as a domain to establish and accommodate cultural pluralism.[14] For Germany, migrant education is a means to promote the overall prosperity of the country. Their approach is rooted in the belief that supporting migrants and affording them these opportunities will strengthen their other institutions and the upwards mobility of the country. This can be thought of in terms of a two-way approach to integration.

The Netherlands is also a long-established destination country. In 2009, non-nationals accounted for approximately 3.9% of the total population — 5.2% of this population is under the age of seventeen. As a result, they maintained a concrete and coherent multicultural model of integration.[15] The Netherlands have made integration a high priority due to the persisting gap in educational and economic attainment between immigrants and the native-born. Historically, they have been one of the worlds champions of multiculturalism, allowing cultural difference to flourish freely. However, since the early 1990s, they have turned to a more civic integration approach that stresses the active citizenship of migrants. Previously, the Dutch ignored basic liberal democratic values, like not requiring immigrants learn the Dutch language, in favor of the acceptance of diversity. Vasta argues that this ultimately contributed to the erosion of social cohesion in

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[13] Sandra Lavnex, "National Frameworks in Migration Research: The Tactic Political Agenda," in *International Migration Research: Constructions, Omissions, and the Promises of Interdisciplinarity*, ed. Michael Bommes and Ewa Morawska (Routledge, 2005), 250.

[14] Scholten, *Framing Immigrant Integration*, 248.

[15] Ibid., 278.

the Netherlands.[16] This sudden shift stems from growing sentiments among natives that the multicultural approach made migrants too welfare dependent.[17] Thus, the onus has been placed on the migrant for their own integration; the Netherlands have adopted a "policy of no policy." This is not to say that integration in the Netherlands has liberalized. In fact, they have established that "the government [should] consistently monitor the effort migrants make to integrate."[18] Dutch integration policy has taken an assimilationist turn because an emerging underclass of immigrants "[do] not identify sufficiently with Dutch culture and society, and [are] unwilling and unable to integrate."[19] Sensitivity to this social disparity is heightened by the recent connections between immigration and terrorist activity, in particular, the murder of filmmaker Theo Van Gogh at the hands of a Muslim Dutchman in late 2004.[20] Thus, the Dutch approach to integration can now be described as demanding but not supportive. Their directive for education is to prevent the dissolution of social cohesion at the hands of the migrant population. Education is used primarily as a protective tool.

The way each state approached integration policy is an obvious response to changing socio-political contexts. As Germany's society becomes more permissive and accepting of the migrant community, they must address the existing

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[16] Ellie Vasta, "From Ethnic Minorities to Ethnic Majority Policy: Multiculturalism and the Shift to Assimilationism in the Netherlands," *Ethnic and Racial Studies* 30:5 (2007): 695.

[17] Scholten, *Framing Immigrant Integration*, 279.

[18] Netherlands Ministry of Social Affairs and Employment, "New to the Netherlands: For European Labour Migrants," June 2016.

[19] Vasta, "From Ethnic Minorities to Ethnic Majority Policy," 714.

[20] Nana, "With Strict Policies in Place, Dutch Discourse on Integration Becomes More Inclusive."; Vasta, "From Ethnic Minorities to Ethnic Majority Policy," 714.

inequalities between migrants and natives. In contrast, the Netherlands have previously been a dominantly multicultural state, but as it grows and changes it has found itself outgrown its old policies. It is no longer effective. Thus, they have taken on an assimilationist approach to repair and protect their social cohesion.

Both Germany and the Netherlands have made great strides in formal education policy since the CBP was published in 2004. Germany created the National Integration Plan that employs ten working groups to further the specified directive of the CBP by assessing concrete actions and voluntary commitments of the *Länder* (Federal States), local authorities, important societal groups, and migrant organizations.[21] A main target of the National Integration Plan is "ensuring good education and training."[22] It lists "a federal network of education sponsors to support children and youth from migrant families in school and training courses" and "providing easier access to vocational training grants and student grants (BAföG) for foreign youth" among the most important actions to be taken to further integration. However, their actual policy is indirect, thus leaving the federal states to their own will and devices. [23]

As a result of Germany's strong welfare state, there are a great deal of directives towards promoting the overall quality of the education system. This has since evolved into the National Action Plan on Integration which focuses

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[21] Maria Bohmer, "The National Integration Plan – A Contribution of Germany Towards Shaping a European Integration Policy," *Commission of the Federal Government for Migration, Refugees and Integration* (2007): 2.

[22] Federal Government of Germany, "National Action Plan on Integration," 2011.

[23] Bohmer, "The National Integration Plan," 2.

specifically on the creation of "instruments in order to render the results of integration policy measurable."[24] The explicit motivation for the German government is that "integration cannot be imposed; it is a matter of living."[25] Their approach to integration is a two-way process that encourages its migrants to become a seamless part of society; neither culturally indistinguishable nor segregated. Their approach holds a belief that education is important for migrants to fully understand and actively participate in the community. Without proper language training they are socially excluded. Deficient training and education means they lack the same employment opportunities as the native-born. Migrants might "not accept the basic rules of coexistence," as a result of improper cultural exposure and immersion in settings like schools.[26] To address these problems, Germanys integration program targets the specific needs of immigrants that would otherwise inhibit their contributions from society.

Due to the shift of immigration levels in the last decade, the Netherlands have made integration a lower priority. Their approach has come to be generally defined as a "policy of no policy."[27] Due to limited devoted resources, they have adopted a more one-way integration process, wherein mature immigrants are "demanded but not supported" in learning Dutch and the core civic values.[28] With this, there is a decrease in policy support for immigrants and their education. However, lack of formal support does not mean it is not a key issue in the eyes of the

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[24] Federal Government of Germany, "National Action Plan on Integration."

[25] Ibid.

[26] Bohmer, "The National Integration Plan," 3.

[27] Migrant Integration Policy Index, "Netherlands." http://www.mipex.eu/netherlands.

[28] Ibid.

Dutch government. Policy changes in 2003 directly responded to the "pressing need to foster social cohesion by increasing knowledge of Dutch society and history, acknowledging the contributions of diverse groups to this history, and to cultivate a sense of participatory citizenship."[29] It is clear that the Netherlands perceive migrants as a heavy threat to social order. Within three-and-a-half years of permanent residence, migrants must take a civic integration exam that tests their language skills and cultural knowledge.[30] Education is used to make migrants fit into the Netherlands's existing society and maintain the status quo.

A state's approach to education and their primary objectives can be understood by looking at where they focus their resources and what areas they concentrate on. Germany and the Netherlands are concerned with similar spheres of education, though the support they provide varies. Both countries emphasize the need for basic language skills as an essential skill for effective citizenship. Language competence is a huge influence of learning outcomes as a whole. The German National Action Plan on Integration acknowledges that one of the crucial reasons children and teenagers with immigrant backgrounds are having trouble in their education and post-education is an insufficient knowledge of German. This draws on the second indicator of effective education framework which is targeted support for migrant students' needs. The key hindrance on the German education system is effective language training for immigrants. This follows the approach that the goal of integration is to approach effective citizenship and migrant presence in all levels of

[29] Nana, "With Strict Policies in Place."

[30] Netherlands Ministry of Social Affairs and Employment, "New to the Netherlands: For European Labour Migrants," June 2016.

society. Germany sees it as contributing to the upward mobility of migrants.

Germany provides basic vocational training to its migrant population. To promote this training, they have also displayed an increase in sensitivity towards the cultural characteristics of their migrant communities, making it more accessible. For example, Muslim women now have the choice of taking female only language courses.[31] An emphasis on gaining basic cultural knowledge is also evident in the Netherlands. They explicitly require a degree of Dutch language from their citizens. The government articulates, that "it is important that you learn Dutch quickly; learning the language is part of the compulsory integration process."[32] Through the government, a few online programs are available to migrants at no charge (for example *Oefenen.nl* and *Naarnederland.nl*). Beyond this, there is very little targeted support. Migrants are expected to develop sufficient language skill on their own terms. PISA results from 2006 indicate that migrant students invest extra time into learning Dutch outside of regular school.[33] Schools often do not attend to the language skills of migrant children as necessary for them to meet the given standards for citizenship. This approach is highly reflective of the Netherlands's civic internationalist approach. Migrants are responsible for their own integration and it is crucial that they do so for the sake of society.

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[31] Eric Leise, "Germany Strives to Integrate Immigrants with New Policies." *Migration Policy Institute*, July 2007.

[32] Netherlands Ministry of Social Affairs and Employment, "New to the Netherlands…"

[33] Claire Shewbridge, Moonhee Kim, Gregory Wurzburg, and Gaby Hostens, *OECD Reviews of Migrant Education: Netherlands 2010* (OECD Publications Centre, 2010).

The Progress in International Reading Literacy Study (PIRLS) is an international assessment framework that assess the literacy of students in the fourth grade of schooling. The difference in scores between national and non-national children in Germany was fifty-four points in 2001 and has closed to forty-six in 2006. In the Netherlands it narrowed from forty-three to forty.[34] Both countries have shown significant improvements, however, it is Germany who has made a real effort due to dramatic past inequality.

A second area of concern for both countries is enrollment in early education and the continuing education of migrant students. The benchmark for the EU is that at least 95% of children from four-years-old to compulsory school age should participate in early childhood education. In the Netherlands, all children are afforded the opportunity to complete their full basic education regardless of legal status.[35] Native and migrant children enroll almost equally in compulsory education programs (before the age of four) where participation in organized instruction is nearly universal.[36] The extent to which the Netherlands focuses on early childhood enrollment speaks to their goal of shaping a specific (and predetermined) society. In Germany, there is a large disparity in the population with low education levels: almost 50% of the migrant population.[37] Germany's approach views early education as a priority due to the assumption that "inequality has its roots in early education depending on their social class and immigrant status."[38]

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[34] European Commission, "New Priorities for European Cooperation in Education and Training," August 2015.

[35] Migrant Integration Policy Index, "Netherlands."

[36] European Commission, "New Priorities for European Cooperation in Education and Training," August 2015.

[37] Ibid.

[38] Frederick De Moll and Tanja Betz, "Inequality in Pre-school Education and Care in Germany: An Analysis by Social Class and

This disparity that exists in migrant education rates reflects the underclass that exists in German society.

Migrant students in Germany are also have a 22.7% chance of leaving the education system before obtaining an upper secondary qualification (compared to the 8.8% for non-migrants).[39] In the Netherlands, the reverse is true; it is primarily natives at risk of exiting the education system, while almost all migrants remain. The main directive of both policies focus on compulsory basic education; that is education at a very low level. However, its programs do very little to promote higher education even at a secondary tier. In the Netherlands, higher education intuitions lack the funding to increase diversity policies that attempt to increase enrollment of migrant students.[40] Instead, the state has directed their attention towards early education when students are the most malleable. It is more effective to instill desired values and norms on children at a young age. The percent of migrant young people (ages 15 to 34) in Germany who are neither employed nor in education or training has decreased from 28% in 2006 to 21% in 2013.[41] In the Netherlands, the number is smaller, at 19%, however, there has been little reduction in the last ten years.[42] Germany makes higher education more accessible to migrant populations to try and advance their future prospects and socio-economic status.

Immigrant Status," *International Studies in Sociology of Education* 24:3 (July 2014): 240.

[39] EUROSTAT, "Population by educational attainment level, sex, age and citizenship," 2013.

[40] Migrant Integration Policy Index, "Netherlands," http://www.mipex.eu/netherlands.

[41] EUROSTAT, "Population by educational attainment level, sex, age and citizenship."

[42] Ibid.

The different approaches Germany and the Netherlands have taken to education as a tool of integration speaks to the problems in their respective societies they are trying to address. Education is a core factor in shaping society and attending to its problems from the bottom up. Individual policy is inevitably guided by a country's experience and context. Both Germany and the Netherlands have seen dramatic shifts in their migrant populations in the last decade. This is deeply reflected in the policy changes they have adapted: Germany has become increasingly inclusive to promote migrants as active participants in the community; simultaneously, the once multicultural Netherlands has shifted to a more assimilationist approach as a result of a decaying relationship between natives and migrants. Germany has made migrant education a top priority, actively supporting it. The Netherlands have withdrawn control and left migrants to their own devices. Despite the major differences in approach, both countries have produced similar results statistically. It is evident that there is no universally applicable policy for education because there is no universally appealing outcome. Rather, it is a tool of government to use in order to build ideas and infrastructure in their individual areas of concern. The EU can set a standard for migrant education as it relates to the overall living standard of its citizens through the CBP. The directive may look straight forward on paper, taking on the language of a universal maxim. But, every state has a different language - informed by their own experience, ideas, and goals – to read it in.

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Social Fact in *Chaoulli v. Quebec* and *Carter v. Canada*

Negative and Positive Rights in Ideological Interplay

Myim Bakan Kline

This essay compares two recent Supreme Court of Canada [the Court] decisions involving section 7 of the Canadian Charter of Rights and Freedoms [*Charter*]: *Chaoulli v. Quebec (Attorney General)* [*Chaoulli*][1] and *Carter v. Canada (Attorney General)* [*Carter*].[2] Both cases concerned legislative restrictions that, as the Court found, caused physical and mental suffering for individuals, and thereby violated the *Charter's* section 7 right to "life, liberty and security of the person."[3] In *Chaoulli*, Quebec legislation barred individuals from buying private medical insurance, thereby forcing them to suffer long wait times for medical services in the public healthcare system. In *Carter*, the *Criminal Code* barred individuals from engaging physicians to help them end their lives, thereby forcing patients to suffer through terminal illnesses.

Comparing these two cases, this essay argues, teaches us that the liberal ideological form of rights powerfully shapes how the Court engages in rights review, even overriding well-established principles of *stare decisis* (*Carter*) and deference by appellate courts to trial judges'

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[1] *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791, 2005 SCC 35. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2237/index.do.

[2] *Carter v. Canada (Attorney General)* [2015] 1 S.C.R. 331, 2015 SCC 5. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do.

[3] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*.

factual findings (*Chaoulli*). The essay focuses on how the Court deals with the respective factual findings of trial judges in each case, and demonstrates how it is here that the effects of liberal ideology are most evident. More specifically, it argues that the incongruous approaches to factual findings in the two cases can be explained, at least in part, by those judges' liberal ideological understanding of *Charter* rights, and how those shape the relevant issues. The entrenchment and broader implications of liberal rights ideology for Canadian constitutionalism are highlighted throughout the essay and the focus of its conclusion.

Liberal Ideology and Rights Review

Rights, as they are formed in the *Charter*, bear a certain logic of self-evidence — a naturalness and inevitability that helps protect rights from critique and restrictions.[4] Rights discourse, understood as *ideologica*l discourse,[5] can be traced back to liberal thinkers such as John Locke.[6] It is manifest in the ways governments both justify limiting their own authority, and in how they enforce the contractual capacities and property entitlements of individuals, as well as in constitutional documents like the *Charter*. Rights review proceedings under the *Charter* are, however, sites where liberal rights discourse is

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[4] Etzioni, Amitai. "The Normativity of Human Rights Is Self-Evident." *Human Rights Quarterly* 32, no. 1 (2010): 187-97. doi:10.1353/hrq.0.0134.

[5] Ignatieff, Michael. *Human Rights as Politics and Idolatry*. The Tanner Lectures on Human Values. 2000. (292). http://tannerlectures.utah.edu/_documents/a-to-z/i/Ignatieff_01.pdf.

[6] Haule, Romuald R. "Some Reflections on the Foundation of Human Rights - Are Human Rights an Alternative to Moral Values?" *Max Planck Review of United Nations Law* 10 (2006): 367-95. http://www.mpil.de/files/pdf3/08_romuald1.pdf.

explicitly clear and prominent.[7] As Joel Bakan describes it: "Courts tend to rely on liberal rights discourse when interpreting the *Charter*, presenting government regulation as the primary threat to human liberty and equality, and individuals as abstract equals unaffected by structural forms of domination and exploitation."[8]

The Court's decisions in *Chaoulli* and *Carter*, though distinct in many ways, are united by their reflections of these decidedly liberal doctrinal and ideological elements. After brief descriptions of each case, the essay will compare them in terms of how those liberal elements are manifest in judicial reasons, and what the comparison tells us about the nature of Canadian constitutionalism.

Chaoulli v. Quebec (Attorney General)

At issue in *Chaoulli* was the question of whether or not Canadians' section 7 right not to be deprived of "life, liberty, and security of the person" except in accordance with the "principles of fundamental justice" should allow individuals access to private health insurance.[9] Dr. Chaoulli, a physician, and Mr. Zeliotis, a patient, sued the province of Quebec, arguing that the medical-services wait times to which Mr. Zeliotis was being subjected deprived him of "life, liberty, and security of the person."[10] It followed, they argued, that prohibitions on the sale of

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[7] O'connell, Paul. "The Death of Socio-Economic Rights." *The Modern Law Review* 74, no. 4 (July 4, 2011): 532-54. doi:10.1111/j.1468-2230.2011.00859.x.

[8] Bakan, Joel. Just Words: *Constitutional Rights and Social Wrongs* (University of Toronto Press, 1997), 4.

[9] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*.

[10] Ibid.

private health insurance for publicly-insured medical services — found in the Quebec *Hospital Insurance Act*, and several other Quebec laws[11] — violated section 7, and were unconstitutional as arbitrary attempts by the government to preserve public health care. The argument rested on the presumption Mr. Zeliotis could avoid wait times by seeking private health care if he was privately insured.

The case made its way to the Supreme Court of Canada and was heard by seven judges. The four-strong majority decision in favour of Dr. Chaoulli was split. Deschamps J. based her decision that Quebec's ban on private health insurance is unlawful on the *Quebec Charter* — a legislative, not constitutional, document — and refused to make a ruling on the Canadian *Charter*.[12] The three remaining majority judges, McLachlin CJ., Bastarache J., and Major J., reached the same conclusion, though under section 7 of the Canadian *Charter*. Prohibitions on private insurance, they argued, violate Canadians' right to receive medical attention within a reasonable time, a right the justices determine is guaranteed by section 7's right to "life, liberty, and security of the person."[13] Moreover, the judges held that the prohibitions on private insurance are arbitrary (as they relate to their legislative objective of preserving the public health care system) meaning the limitation on "life, liberty and security of the person" does not accord with the "principles of fundamental justice."

Binne J. and Lebel J., writing together for the three dissenting judges (Fish J. is the third) argued that

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[11] *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791, 2005 SCC 35. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2237/index.do.
[12] Ibid.
[13] Ibid.

prohibitions on private insurance do not violate section 7.[14] Their disagreement with the majority was derived from concern about the majority's ready reliance on expert testimony espousing the merits of health care systems that include private insurance components in support of its conclusion that the Quebec legislation is arbitrary. They emphasized, pointedly, that the trial judge had reached opposite factual conclusions. The dissenters proposed that Dr. Chaoulli's action and its potential legislative and judicial consequences are matters of social policy, especially in light of the trial judge's factual findings, and should therefore be deliberated on by the National Assembly as a matter of democratic decision, not by the courts as a matter of rights. Their concern, in effect, is that the majority's decision to enforce negative rights (by striking down legislative prohibitions on private insurance) risks undermining the system of positive rights manifest in Canada's public health care system.

Carter v. Canada (Attorney General)

The *Carter* case was similar to *Chaoulli* in that it concerns Canadians' rights to "life, liberty, and security of the person" as stipulated in section 7 of the Charter.[15] *Carter* featured (among other complainants) an individual with a grievous and irremediable medical condition, Gloria Taylor, claiming section 7 granted her a right to a physician-assisted death. She challenges Canada's *Criminal Code* prohibition on physicians aiding, abetting, counseling, or otherwise assisting a person in committing

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[14] *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791, 2005 SCC 35. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2237/index.do.
[15] *Carter v. Canada (Attorney General)* [2015] 1 S.C.R. 331, 2015 SCC 5. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do.

suicide (s. 241). While the constitutionality of that prohibition had already been confirmed by the Court in the 1993 decision *Rodriguez v. British Columbia (Attorney General)*,[16] the Court in *Carter* unanimously decided not to follow *Rodriguez*. It justifies this subversion of the principle of *stare decisis* by invoking the trial judge, Lynn Smith J's, decision that the "social facts" surrounding assisted dying had changed significantly since *Rodriguez*. In this direct clash between *stare decisis* and the principle that trial judges' factual findings should be deferred to by appellate courts, the latter prevailed and the Supreme Court struck down the *Criminal Code's* prohibition on assisted dying. A blanket ban is overbroad, the Court held, and thereby infringed section 7 in ways that cannot be justified under section 1.[17]

Two Principles at Issue in *Chaoulli* and *Carter*

The nature of Canadian appellate courts means that they are primarily concerned with applications of law as opposed to determining the facts of cases.[18] The latter is the task of lower-level trial judges. The time-consuming process of constructing a factual record includes the testimony of experts and witnesses, as well as recountings of oral histories, and assessments of credibility, among other components, and because trial judges are actually *there*, in the courtroom with witnesses and lawyers, their records of factual findings are typically deferred to by

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[16] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1054/index.do.
[17] *Carter v. Canada (Attorney General)* [2015] 1 S.C.R. 331, 2015 SCC 5. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do.
[18] Department of Justice Canada. "Canada's Court System." Accessed November 11, 2016. http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/pdf/courten.pdf.

appellate courts such as the Court.[19] The *Chaoulli* Court overrode that principle of deference. In *Carter*, the Court overrode a different principle, *stare decisis*, which governs the precedent-based common law system by insisting similar cases be decided alike, *because* it deferred to the trial judge's factual findings. In other words, The *Chaoulli* and *Carter* decisions present conflicting approaches to the respective trial judges' factual findings with different implications. Taken together, they demonstrate just how powerful rights ideology is in both decisions.

In *Carter*, the Court, as noted, was extremely deferential to the trial judge, to the point that, in the name of that judge's factual record, it overrules its own relatively recent decision, *Rodriguez* (1993). In *Rodriguez*, the Court held that the *Criminal Code's* blanket ban on physician assisted-suicide was constitutional.[20] Considering her social factual findings throughout the trial, the trial judge in *Carter* concluded that that blanket ban was unconstitutional, therein refusing to follow *Rodriguez* and blatantly contravening the doctrine of *stare decisis* (as the BC Court of Appeal pointedly held). The Court vindicated the trial judge, however, stating that "*stare decisis* is not a straitjacket that condemns the law to stasis"[21] (this affirmation was, ironically, justified by *stare decisis*: the Court invoked its previous decision, *Bedford,*[22] in support of not following *Rodriguez*). The Court's willingness to set aside the doctrine of *stare decisis* out of deference to the

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[19] Department of Justice Canada. "Canada's Court System."

[20] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1054/index.do.

[21] *Carter v. Canada (Attorney General)* [2015] 1 S.C.R. 331, 2015 SCC 5, at para. 44. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do.

[22] *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, 2013 SCC 72. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do

trial judge's findings of social fact was applauded by many as a forward-looking and progressive departure from narrowly legalistic decision-making, a triumph of substance over form.[23]

The *Carter* decision's deference to the trial judge contrasts sharply, however, with the *Chaoulli* majority's rejection of the trial judge's factual findings. McLachlin CJ. and Major J. held that there was no compelling evidence that "the prohibition on the purchase and sale of private health insurance protects the health care system," and therefore that "the rational connection between the prohibition and the objective is not made out."[24] They reached this conclusion despite the trial judge's clear determination that as a matter of *fact* the evidence demonstrates the introduction of private insurance is a threat to the public health system. The trial judge in *Chaoulli*, according to the dissenting opinion, "found that the expansion of private health care would undoubtedly have a negative impact on the public health system."[25] Quebec's Court of Appeal followed the trial judge's lead.[26] Had McLachlin CJ. and Major J. done the same, and given the trial judge's factual findings the same weight that the *Carter* Court gave Lynn Smith J.'s factual findings — indeed, any weight at all — they could not have rationally

[23] Dying With Dignity Canada. "Carter v. Canada and the Road to Choice." Dying With Dignity Canada. Accessed November 11, 2016. http://www.dyingwithdignity.ca/carter_v_canada_and_the_road_to_ch oice.

[24] *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791, 2005 SCC 35, at para. 155. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2237/index.do.

[25] *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791, 2005 SCC 35. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2237/index.do.

[26] *Chaoulli v. Attorney General of Quebec* [2002] R.J.Q. 1205 to 1215. www.law.utoronto.ca/.../chaoulli/CourtofAppeal_decision_eng.doc.

concluded Quebec's ban on private insurance was arbitrary.[27]

Liberal Ideology in *Chaoulli* and *Carter*

All of which raises the question: *why* are the trial judges' findings of fact treated so differently in these cases? The answer may be found in the strong liberal ideological tendencies of *Charter* rights jurisprudence in negative and anti-statist terms. The trial judge's factual record in *Carter* strongly supports a negative rights construction of physician-assisted dying, demonstrating that individuals suffer directly as a result of state prohibitions without any corresponding benefits. In *Chaoulli* the trial judge's factual findings do exactly the opposite, revealing that a state prohibition (on private insurance) helps *avoid* suffering by protecting the public health care system, and therefore equal accessibility. It follows from the trial judge's findings in Chaoulli that while striking down legislation against private insurance in *Chaoulli* might advance the negative rights of individuals — much as s. 241 in *Carter* does — unlike in *Carter*, it does so by degrading the positive rights system of public health care.[28] A negative right for individuals to buy private insurance does not in many cases enable them to actually buy that insurance, which many Canadians cannot in fact afford. At the same time, introduction of a two-tiered health system, the likely effect of *Chaoulli*, may enable deterioration of the publicly provided health care side of

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[27] Flood, Colleen M., and Steven Lewis. "Courting Trouble: The Supreme Court's Embrace of Private Health Insurance." *Healthcare Policy*, September 2005, 26-35. doi:10.12927/hcpol..17563.

[28] *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791, 2005 SCC 35, at para. 258. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2237/index.do.

that system and the egalitarian positive rights that go with it.[29] McLachlin CJ. and Major J. manage to obscure this rights trade-off — the loss of positive rights as a result of vindicating negative rights — only by refusing to accept the trial judge's factual findings. As noted, accepting those findings would negate the intelligibility of their decision.

In other words, the conflicting approaches to the trial judges' factual findings in *Chaoulli* and *Carter* nonetheless manifest a shared liberal ideological construction of issues and events — one that's decidedly negative rights-oriented, and prefaced on abstract, and predominantly bourgeois conceptions of the individual.[30] Within this framework, rights do not demand the state facilitate the ends that a right might ideally achieve, but are limited to stopping the state from violating that right. In *Chaoulli*, as noted, the trial judge's factual record suggests that vindicating negative rights actually undermines positive rights. In *Carter*, on the other hand, the trial judge's factual record reveals that vindicating negative rights is the best way to end state-imposed suffering; Gloria Taylor's cause is enabled and affirmed by the trial judge's findings and the negative rights framework it supports — again, to the point the Court feels justified in abandoning *stare decisis*.[31]

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[29] Lewis, Steven. "Medicare's Fate: Are We Fiddlers or Firefighters?" *Law and Governance*, June 2005. http://www.longwoods.com/content/17186; *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791, 2005 SCC 35, at para. 165. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2237/index.do.

[30] LaSelva, Samuel V. *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood*. Montreal: McGill-Queen's University Press, 1996.

[31] *Carter v. Canada (Attorney General)* [2015] 1 S.C.R. 331, 2015 SCC 5. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do.

Comparing *Chaoulli* and *Carter* highlights how deeply enshrined in *Charter* rights review is a liberal ideological perspective, preferential to negative over positive rights, and thus establishing normative negativity (as it relates to rights review) within the judicial imagination. Alan Cairns identifies one of the central purposes of the Charter as "an instrument to reallocate sovereignty in the people rather than in the governments of Canadian federalism."[32] This is similarly a central purpose of negative rights: to enforce and empower the abstract individual, notwithstanding, however, disparities in actual individual capacities and social status. Positive rights or entitlements, in contrast, serve to empower collectivities of individuals — manifest, in this context, in governments — to bestow all individuals within these groups equal benefits.

Positive and Negative Rights to Health Care

The rights that guarantee healthcare to all Canadians, though found in legislation rather than the constitution, are within the realm of positive rights Canadians enjoy. Although these rights saw much opposition throughout the 20th century, growing trust in government in the post-war period enabled the federal government to implement shared-cost programs that established our public healthcare system[33] — a web of

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[32] Cairns, Alan C. "Reflections on the Political Purposes of the Charter" in *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto, ON: McClelland and Stewart, 1995), quoted in *POLI 320 The Canadian Constitution*, (Toronto, ON: University OF Toronto Press Custom Publishing), 28.

[33] Richer, Karine. "The Federal Spending Power." Parliament of Canada. November 13, 2007.

http://www.lop.parl.gc.ca/content/lop/researchpublications/prb0736-e.htm#use.

interrelated legislation, programs, and public and private practitioners that enables all Canadians to access core (as legislatively defined) medical services (some have suggested that the rights to public health care go beyond legislation and are in fact protected by section 7 of the Charter s.7 rights to "life, liberty, and security of the person").[34] *Chaoulli* puts this positive entitlement system at risk by establishing a private component to the system. The majority judges are only able to justify their decision by refuting the trial judges' findings that such a risk exists. The abstract individual wins; liberty to choose is increased regardless of resulting detriments to the public system, and in fact individuals', positive rights are undermined.

The irony is that *Chaoulli* actually may also end up undermining the actual realization by individuals of the negative rights celebrated in *Carter* and other health-related cases, such as *Morgentaler*.[35] Following *Carter*, individuals with their new rights to physician-assisted dying still require a willing doctor, a willing venue, and either public funding or the necessary financial means to exercise their right. They are now free to do it, but there are other potentially prohibitive factors beyond the legal prohibition. The same is true of abortion procedures. *Morgentaler* grants women a negative right to an abortion, but there must be public entitlement or other resources available to them to exercise that right.[36] If *Chaoulli*j leads to an unraveling, or at least diminution, of public healthcare in Canada, as the trial judge's factual findings suggest it

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[34] *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791, 2005 SCC 35. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2237/index.do.

[35] *R. v. Morgentaler* [1993] 3 S.C.R. 463. http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1053/index.do.

[36] *R. v. Morgentaler* [1993] 3 S.C.R. 463. http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1053/index.do.

could, that will severely impair individuals' capacities to exercise their negative *Charter* rights to both physician-assisted dying and abortions. There is, in other words, sometimes a dependence of negative rights on positive rights — exercising the former may demand that individuals have capacities granted by the latter. That dependence becomes invisible, however, when the abstract presumptions of liberal ideologies take the place of social realities, like those revealed by the *Chaoulli* trial judge's factual findings.

Cairns identifies the underlying purpose of the *Charter* to be one of unification: a measure to rearticulate Canadian conflicts to circumvent provincialist and language-based conflicts, and to establish the fundamental lines of political conflict in Canada as individual vs. government.[37] The *Charter* caused, or at least meant to cause, Canadians to unite in a renewed, and fundamentally oppositional relationship with government.[38] Disunity between individuals and government thus became the tool for promoting unity; for overriding conflicts among provincial allegiances, cultural allegiances, and language-based allegiances.

Comparing *Chaoulli* and *Carter* suggests the Court is playing its designated role in promoting an individual vs. government construct of political conflict in Canada — a

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[37] Cairns, Alan C. "Reflections on the Political Purposes of the Charter" in *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto, ON: McClelland and Stewart, 1995), quoted in *POLI 320 The Canadian Constitution*, (Toronto, ON: University OF Toronto Press Custom Publishing), 27.

[38] Sigurdson, Richard. "Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics" in *International Journal of Canadian Studies* (1995), quoted in *POLI 320 The Canadian Constitution*, (Toronto, ON: University OF Toronto Press Custom Publishing), 54.

liberal construct. The comparison shows that Peter Russell's 1983 expectation that the Charter would "politicize the judiciary"[39] has been realized; that politicization has taken the form of more deeply entrenched elements of liberal ideology in Canadian constitutionalism. *Carter* demonstrates that those liberal elements — individual freedom, formal equality, and a construct of government as a threat to freedom — can truly serve to promote freedom and equality when government is the actual threat. The factual record constructed by the trial judge revealed that the government prohibition on physician-assisted suicide denied individuals freedom of choice in ways that inflicted suffering upon them, and without any corresponding benefits. The Court's liberal orientation drove it to be activist, to the point it was willing to overturn *Rodriguez* and ignore *stare decisis*.

  Chaoulli too reveals the power of liberal ideology in rights-review, but, importantly, it also reveals its dangers. If government is the enemy of freedom and equality, as liberal ideology suggests, it cannot be the friend of those values. In their decision McLachlin CJ. and Major J. seem so set on upholding the liberal paradigm of negative rights — of vindicating individual rights against an overbearing state — that they refuse factual findings by the trial judge that contradict those presumptions. What the trial judge held, in effect, is that the state has a role to play in promoting freedom and equality through positive rights to health care; and moreover, that the exercise of negative rights could undermine those positive rights. By refusing to acknowledge social facts that refuted the abstractions of liberal ideology, the majority further entrenched the latter

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[39] Russell, Peter H. "The Political Purposes of the Canadian Charter of Rights and Freedoms." *Canadian Bar Review* 61 (March 1983): 51. https://cbaapps.org/cba_barreview/Summaries.aspx.

— liberal ideology — in Canadian constitutionalism. For that reason, the case may turn out to set a precedent that undermines a key and distinguishing feature of Canada's political, if not constitutional, culture — the notion that governments are obliged to promote social equality, freedom, and welfare through programs, like public health care, that provide necessary public services as a matter of entitlement for all citizens.

We can only hope in some future decision the Court will follow *Carter* as a precedent for not following *Chaoulli*.

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Is Proportional Best for Israel?

The Challenges of Proportional Representation in Israel

Jacob Noseworthy

   With countries like Canada and the United States discussing the possibility of changing their electoral systems[1] it becomes important to look at case studies of the uses of various electoral systems throughout the world. Israel is one of 19 countries around the world that use the closed-list system of proportional representation, in which voters vote directly for a party without voting for a candidate.[2] Israel's system does not have individual electoral districts, so the entire country forms something akin to one large district in regard to the selections from the party list.[3]

  With a low threshold to win a seat of only 3.25% — in comparison to other thresholds, like Turkey's at 10%[4] — it is easy for many parties to make up the Israeli parliament.[5] This presents a set of challenges unique to a proportional representation system. This essay outlines what proportional representation is, what the problems with

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[1] Amanda Shendruk, "Making sense of electoral reform: What are Canada's options?" *Maclean's*, 2016.

[2] Moshe M. Czudnowski, "Legislative Recruitment under Proportional Representation in Israel: A Model and a Case Study," *Midwest Journal of Political Science* 14:2 (1970): 232.

[3] C. Paul Bradley, *Parliamentary elections in Israel*, 1st ed. (Grantham, N.H.: Tompson and Rutter, 1985), 22.

[4] "Electoral Systems," *Ace Project*, n.d. http://aceproject.org/ace-en/topics/es.

[5] Neri Zilber, "Israel's Governance Law: Raising the Electoral Threshold," *Washington Institute*, 2014.

a system of pure proportional representation such as in Israel are, and argues that it is not the ideal electoral system for Israel in particular. This paper will explain how coalition governments, especially those with several parties and ideologies, can be problematic for democracy; how small, sometimes extremist, parties in coalition governments often hold far more power than they should simply because larger parties need to cater to them for their votes in parliament; and how proportional representation leads to the splintering of parties. Finally, this paper will look at the benefits of proportional representation and argue that while the system can be beneficial, in the case of Israel, the disadvantages outweigh the benefits.

Proportional representation is "an electoral system in which the number of seats won by each of the competing parties is proportional to the number of votes they each win."[6] While there are different systems of proportional representation,[7] Israel uses a closed-list system, meaning that parties determine the order of which they want their candidates to be elected while the voters determine how many candidates from each party are elected.[8] Israel's currently remains the only country to have no voting districts. This means that every citizen's vote across the country is equal and goes to elect the same representatives without regional representation.

However, not much thought was put into the creation of Israel's electoral system. As Reuven Hazan, a political science professor at the Hebrew University of Jerusalem explains:

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[6] Rod Hague, Martin Harrop, and John McCormick, *Political Science: A Comparative Introduction*, 8th ed. (London: Palgrave Macmillan, 2016), 272.

[7] Ibid., 273.

[8] Bradley, *Parliamentary elections*, 23-24.

> Days after Israel was established in 1948, it found itself embroiled in a war with its Arab neighbours. The new state, therefore, simply kept using the same electoral system that had been in use during the pre-state period of the British Mandate for Palestine - a pure form of proportional representation with the entire state serving as one constituency, and lacking any meaningful threshold. Israel thus never deliberately chose, or even extensively discussed, a new electoral system, despite the assertion by its leaders that the electoral system would receive its due deliberation and be altered.[9]

Because Israel adopted the "parliamentary-proportional electoral system… used in the elections for the Zionist Congresses and the various institutions of pre-state Israel,"[10] the benefits and disadvantages of the system were not considered when selecting the system. This means that while other countries have been able to avoid issues with proportional representation by adapting it to their situation or adopting a similar system such as mixed member plurality, Israel's system was never subjected to such scrutiny.[11] This means that the problems, outlined in this essay, have been facing the country for its entire existence as a state — and many have been exaggerated over time.[12]

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[9] Reuven Y. Hazan, "Presidential parliamentarism: Direct popular election of the Prime Minister, Israel's new electoral and political system," *Electoral Studies* 15:1 (1996): 21.

[10] Michael Latner and Anthony McGann, "Geographical representation under proportional representation: The cases of Israel and the Netherlands," *Electoral Studies* 24:4 (2005): 715.

[11] Hazan, "Presidential parliamentarism," 21.

[12] Hazan, "Presidential parliamentarism," 24.

Not much thought was put into the electoral system during the creation of the State of Israel:[13] proportional representation was left over because it was the system used before the official creation of the country. Many people also advocated for it. Proponents of proportional representation argued that a state that would undergo rapid transformation (due to immigration from around the world) needed an electoral system that would represent all its citizens.[14] Proportional representation worked well for this purpose. Proponents also argued that coalition governments would provide a way for parties, representing all types of people, to come together, and create a government for all the people.[15] By forming coalitions, these various parties supported by various people would compromise to create policy that would be agreeable to the largest number of people. The system intentionally creates coalition governments.

In practice, however, these coalition governments have not been as successful as planned. Over time, votes became spread out more and more between parties, making it necessary for prospective coalitions to bring in more parties in order to have enough seats to form a majority government.[16] This situation became especially drastic in 1984 when it looked like there would need to be a coalition with eight parties to form government.[17] This did not end up happening, though, as the major right-wing and major left-wing party came together to form a coalition government, which brought with it a host of challenges of its own: two ideologically opposed parties attempting to

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[13] Hazan, "Presidential parliamentarism," 21.
[14] Latner and McGann, "Geographical representation," 716.
[15] Bradley, *Parliamentary elections*, 76.
[16] Hazan, "Presidential parliamentarism," 23.
[17] Ibid., 23.

govern together. It created a government where neither the left-leaning nor right-leaning voters were happy, even though they were the vast majority of the voters in the election. Furthermore, such coalitions directly contradict the premise that proportional representation is the system that represents everyone. With coalitions made up of parties under the organization of the one largest party, the ultimate control of who forms government is removed from the hands of the voters.[18] Voters have no say in which parties form the government, as those decisions are made by party leaders behind closed doors. This leads to an unrepresentative government, even though the members of parliament are elected through a purely proportional system. Coalitions also create more gridlock within the government. While a single party with the majority of seats, such as those common under the single member plurality electoral system, is much more unified with a common platform and set of beliefs and values, a coalition government made up of many parties with many platforms, values, and beliefs has a much more difficult time coming to decisions.[19] Often in Israel the parties with the most seats within a governing coalition receive a *de facto* veto power, allowing them to scrap legislation and decisions made by the coalition even if the majority of the members in the government agreed to it.[20] This renders governments ineffective on many issues, unable to act if parties with the veto power disagree. It is through these flaws in coalition governments that said government becomes not only unrepresentative of the citizens at large, but it also becomes ineffective and inefficient in making decisions.

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[18] Hazan, "Presidential parliamentarism," 27.
[19] "Electoral Systems," *Ace Project*.
[20] Hazan, "Presidential parliamentarism," 27.

Besides the issues with coalition governments in Israel outlined previously, another issue is that proportional representation gives small parties in governing coalitions too much power. When coalitions are formed — especially in countries like Israel where there are sometimes up to fifteen parties with seats in parliament — the coalition will have a very slim majority of seats.[21] This means that in order for legislation to be passed or a vote of non-confidence in the government to fail, it requires all of the members of the governing coalition to vote as a bloc.[22] This means that even if a party has very few seats, the votes required to pass legislation or stop a vote of non-confidence ensures the small party can make demands of the other parties in the coalition in exchange for their support in votes. For example, this means that a small, fringe party can add potentially radical elements of their platform to government policy, even if very few people support or vote for that party. Thus these parties hold a vastly disproportionate amount of power based on votes gained. This is problematic for democracy because it is, again, unrepresentative of the wishes of the voters. With a threshold of only 3.25% to get seats, a fringe party can potentially be the deciding factor in government with over 96% of the population not ever supporting them.

In Israel the small parties that often hold governing coalitions hostage are ethnicity-based, usually along religious lines,[23] as "most of the parties located in the middle ground between the two major parties [are] orthodox religious parties."[24] Many of these parties are

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[21] Hazan, "Presidential parliamentarism," 23-25.
[22] Ibid., 26.
[23] Hazan, "Presidential parliamentarism," 23; "Electoral Systems," *Ace Project*.
[24] Hazan, "Presidential parliamentarism," 23.

anti-Muslim and anti-Palestinian and threaten to topple any coalition that may be perceived as "anti-settler."[25] In order to form government, a prospective coaltition must "include all of the centrally-located religious parties, as well as most of those parties on its respective extreme end."[26] This forces governing coalitions to cater to the religious parties and their voters, as they might be the deciding factor in whether or not government succeeds. As previously mentioned, the required support of these extreme parties means that they can control not only whether a coalition succeeds or not, but what legislation the government passes.

The tendency for small niche parties to splinter off larger ones, sometimes resulting in them holding a lot of power in Israeli coalition governments, is especially exacerbated by the low threshold of votes needed to gain seats in parliament.[27] For example, in 1984 thirty-one parties ran in the election and fifteen of them had members elected to parliament. Since so many parties were elected and it was possible for even the smallest party in a coalition to have a strong voice in the decisions of the government, there was nothing stopping the further divisions of parties into smaller and smaller groups. This, in fact, encouraged new parties to form.[28] The formation of new parties led to the representation of more diverse views, but amongst those, many were often far-left or far-right, increasing the number of extremist parties in the parliament. With so many, it was possible for parties who won the largest share of the vote to not even be part of the governing coalition.

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[25] Seth Freedman, "Look to Israel for a case study in proportional representation's flaws," *Guardian*, 2010.
[26] Hazan, "Presidential parliamentarism," 23.
[27] Ibid., 23-24.
[28] Hazan, "Presidential parliamentarism," 27.

For example, in 2009, the Kadima party won 22.5% of the vote, but because the Likud party, who finished in second place, was better able to form a coalition with the aid of numerous right-wing splinter parties, they formed government.[29] While the splintering of a particular part of the political spectrum can be detrimental under systems like single member plurality,[30] it can be beneficial within proportional representation in the forming of coalition governments. This further discourages catch-all parties which attempt to appeal to a wide-variety of people. These elements of splintering mean that while a proportional representation system can be more representative in some senses, it can also be harmful to democracy and a strong government.

There are still many benefits to the proportional representation system in Israel despite the challenges it faces. While coalitions can be problematic, many scholars argue that coalitions provide a stronger, more representative government because they force parties to find central ground and compromise on issues to find a solution that better suits a majority of the population.[31] Proportional representation also ensures that unfair results where parties are overrepresented or underrepresented by seats in relation to their vote share do not occur by ensuring that the seat allotment is directly proportional to the vote share each party received.[32] This is especially the case in Israel where the entire country is one voting district. While some countries' results are not directly proportional due to

[29] Alex Bain, "Israel's Flawed Electoral System: Obstacle to Peace and Democracy," *Policy Brief* 32:1 (2011): 3.
[30] Bradley, *Parliamentary elections*, 12.
[31] Bradley, *Parliamentary elections*, 24.
[32] "Electoral Systems," *Ace Project*; Hazan, "Presidential parliamentarism", 22.

smaller voting districts, such as Sweden,[33] this is not the case for Israel.[34] Furthermore, minority parties are awarded representation more in proportional representation systems than other systems. This is especially the case in Israel, where they have a very low threshold to win seats. This low threshold can be beneficial for representation in divided societies; although because Palestinians cannot vote in Israeli national elections, this benefit does not apply to them. Finally, proponents of proportional representation argue that it allows for greater continuity between governments.[35]

Yet many of these traits do not apply to Israel or have been unsuccessful so far. While pure proportional representation could be beneficial to some countries, it does not work in Israel given the political climate of the country and the stranglehold that small, often extreme, parties have on governing coalitions. Some of the problems of proportional representation in Israel could come down to the incredibly low threshold — a higher threshold could greatly decrease the number of parties both in parliament and running in elections. This could also potentially solve the problem of splintering, forcing parties to realise that tactic would be unsuccessful and thus leading to somewhat larger parties with somewhat broader views being formed in order to become popular enough to reach the higher threshold. While the solution would take away some of the representation for the smallest minority groups, it would still allow Israel to have a proportional system without many of the issues present today.

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[33] "Electoral Systems," *Ace Project*.
[34] Ibid.
[35] "Electoral Systems," *Ace Project*.

Israel's specific situation and set of problems with proportional representation provide a challenge for democracy in the country. Through the struggles Israel has had with coalition governments and the issue of the splintering of parties into smaller and more niche groups, it is apparent that proportional representation has not been as successful in Israel as was initially hoped. However, proportional representation still has its own merits as an electoral system, with many benefits — such as the composition of parliament matching the vote share. It is possible that by simply increasing the threshold required to gain seats, proportional representation could be more successful; but as of now, the system has many problems and is not serving the citizens of Israel well.

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Machiavelli and Gene Sharp

Pragmatists for Different Times

Jonathan Carroll

Machiavelli's *The Prince* is touted as one of the primary works of realist political thought, and one of the central articulations of the politics of lesser evil. With such a reputation, it might seem odd to compare *The Prince's* teachings to those of a scholar of nonviolence like Gene Sharp; however, the two are not as different as they might first appear. The main tension comes from the hegemonic understanding of Machiavelli that has arisen from realist International Relations theorists. Many posit "*The Prince* as the ruthless symbol of *raison d'état*, carrying transcendental lessons about the nature of politics and a set of prescriptions on how helmsmen should behave to seize, maintain, and reinforce their power."[1] However, a deeper examination of Machiavelli's work shows it to be a much more nuanced piece, with an indirectly republican understanding of popular sovereignty, that works well with Sharp's theories regarding social sources of power and political maneuvering. Both theorists have a deeply pragmatic approach to political action that focuses on results rather than ethical debates, and which embrace action and conflict in ways that account for the particularities of context and the optics of how the action will be received. The fundamental differences that do exist between the two are mostly a result of the experienced realities of the two thinkers, and the fact that *The Prince* is primarily focused on the establishment and maintenance of power structures, while Sharp's work tends to be concerned

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[1] Caterina Carta, "Gramsci and *The Prince*: Taking Machiavelli outside the realist courtyard?" *Review of International Studies* 43:2 (August 2016). https://doi.org/10.1017/S0260210516000280.

with the disruption of existing regimes. Nonetheless Machiavelli's work is in harmony with much of Sharp's, and it is completely possible that, given modern communications and social realities, Machiavelli's imagined prince might embrace the realistic alternatives of Gene Sharp's nonviolence.

       The first step that must be taken to allow room for Sharp within the framework laid out in *The Prince* is the dispersion of some of the established myths around the infamous piece, or perhaps more accurately, the establishment of alternate interpretations of both the form and function of the piece. It is commonly held that Machiavelli is an advocate of the swift and brutal use of violence, and indeed any evil to secure the stability of a given state and maintain the power of its leaders. Since he states that a prince must "know how to enter into evil,"[2] it is assumed by many that he advocates for the use of evil. Yet, this is not an endorsement of evil by Machiavelli, but rather an endorsement of flexibility. It is the insistence that conflict and that which seems unpleasant should never be recoiled from. What is often mistaken for brutality in *The Prince* is, in actuality, a demand for dedication and conviction. The evil he calls for is a willingness to undergo struggle and conflict, even in ways that are viewed by others as wrong, for the sake of benefiting the political community as a whole. Machiavelli insists that there is no one correct way of doing things, and that political success can only be gained through "[adapting the] mode of proceeding to the qualities of the times."[3] Perhaps his only absolute statement is that there can be no absolute statements.

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[2] Niccolo Machiavelli, *The Prince,* trans. Harvey Mansfield (Chicago: University of Chicago Press, 1998), 70.
[3] Machiavelli, *The Prince*, 99.

Machiavelli's articulations of *Fortuna* and *Virtu* are also of key importance when attempting to build a more fulsome understanding of *The Prince. Fortuna,* Machiavelli's anthropomorphized personification of luck and chance,[4] is viewable as a kind of teleology that describes the inevitable corrosive power of time on all of humanity's institutions.[5] In countenance to that force, he posits *Virtu* – a set of characteristics that "has more in common with virtuosity, or the martial virtues of strength, courage, cunning and so on, than a Christian virtuousness"[6] – as a summation of positive qualities possessed by some leaders that allow them to weather the changing moods of *Fortuna.* The combined forces of good planning and the ability to react to unpredictable events form the cornerstone of Machiavelli's work. If decisive action is taken in times of tumult, and dykes are built against the changing whims of *Fortuna's* river when things are calm, then damage can be mitigated.[7] Machiavelli offers general advice with the caveat that it should be followed according to the specific context that one finds one's self in, and it is because of that specification more than anything that his work can find a harmonious coexistence with Gene Sharp's nonviolent theory.

Despite the obvious distinction, that Machiavelli advocates the use of violence in certain situations while Sharp recommends avoiding it altogether, the underlying themes that inform their works show remarkable similarity. Perhaps most important of these commonalities is the idea

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[4] Simon Glezos, "Virtuous networks: Machiavelli, speed and global social movements," *International Politics,* 53:4 (2016). doi:10.1057/ip.2016.14.539

[5] Hiroaki Abe, "The Vicissitudes of Government: Machiavelli on temporality and pragmatism," *Conference Papers -- American Political Science Association*, 1-28.

[6] Glezos, "Virtuous networks," 545.

[7] Machiavelli, *The Prince*, 99.

of consent-based governance. With Sharp, this is easily observable considering that *There are Realistic Alternatives* is premised on the idea that regimes function by the implicit consent of citizens, and that consent can be withdrawn to bring them down. Machiavelli's articulation of the power of the people is buried somewhat deeper within the text, likely since it was given as a gift to a dictatorial ruler. However, it becomes clear when examining the 19th chapter of the book., "Of Avoiding Contempt and Hatred," that Machiavelli holds the people as the final arbiters over a government. He speaks at great length, this being the longest chapter in the book, about the importance of not being hated by the people, and outlines a series of suggestions as to how to govern in ways that do not upset them. Machiavelli recognizes not being hated as one of the most important parts of ruling, realizing that people have the power to overthrow their governments if they so desire. Machiavelli does away with the ideas of the divine right of rulers or any inherent predispositions of human nature that might encourage people toward being dominated and acknowledges that regimes exist only so long as their subjects allow it. Of course, Sharp's conception of the withdrawal of consent is somewhat more nuanced than the total revolution or simple assassination that Machiavelli describes; however, both thinkers fundamentally address the same position of people in relation to their leaders.

Building off that understanding, ideas like Gene Sharp's "backfire" or "political jujitsu" – whereby Sharp articulates how perceptions of violence caused by a side of a political conflict can undermine that side's public support and legitimacy – mesh well with Machiavelli's guidelines around evil actions and again not attracting the hatred of the people. Sharp states that the use of violence by either regimes or counter-movements can result in

delegitimization for the perpetrators. If an opposition movement begins killing police officers or burning government offices, it can make average citizens uncomfortable with the movement, even if they are themselves opposed to the regime. Likewise, when governments crackdown against peaceful protesters or shoot unarmed civilians, they risk driving more people to the cause and disrupting their own social sources of power. [8] Machiavelli, writing purely from the perspective of a ruler, acknowledges a side of this when he discusses the times at which a ruler must commit "evil" acts. He admits that, while it is occasionally necessary for regimes to commit acts of violence or theft that might seem out of line with the ethical standards of the average person, rulers must do all in their power to avoid being hated for it. [9] In a way, both thinkers are concerned, not just with the victory of individuals or groups, but the optics of those victories and the reciprocal relationship that those optics have with achieving desired results. For example, if a rebel group managed to overthrow an oppressive regime, but were themselves seen as being even more violent and oppressive than those they had deposed, then it would only be a matter of time before another force rose against them in turn.

For both authors, legitimacy comes from the perception of the people, and so to seem legitimate it is important to avoid committing violence that is seen as unnecessary in the eyes of the citizenry. The two thinkers take admittedly different approaches to achieving this. For Machiavelli, the matter of optics is just that, a concern with appearances. For him, appearing to have qualities like faith, honestly, humanity, and religion, is most important. The actuality of necessary action rarely falls in line with those

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[8] Gene Sharp, *From Dictatorship to Democracy* (United States of America: Albert Einstein Institute, 2010), 18.
[9] Machiavelli, *The Prince*, 70.

goals, but that does not change the fact that Machiavelli insists that every possible precaution should be taken to project the image of these qualities. The difference with Sharp is that he advocates for following through, without exception, on commitments to nonviolent and non-evil means for achieving political goals. It is possible that this distinction is one that is more based in the material realities of the times in which the thinkers are writing than it is an actual ideological rift between the two. When Machiavelli was writing in 16th century Europe, violence was a culturally accepted function of governments. Executions were commonplace and war was an almost constant reality. Add to that the lack of any considerable communication networks, beyond simple word of mouth, and you have an environment where there is a significantly lower chance of violent acts becoming widely publicized and causing civil unrest. In the 20th and 21st centuries, during which Sharp has been writing, violent actions can be publicized almost immediately and spread to every corner of the world. Violence can very quickly provoke public outrage, and seemingly small acts can be blown out of proportion depending on the focus of news coverage. An example of this can be seen in the protests on the day of Donald Trump's inauguration as President of the United States. Even though more than 2 million people protested worldwide, a disproportionate amount of coverage was given to a small number of individuals who smashed the windows of a coffee shop and a bank in Washington, DC. Even though millions of people around the world protested peacefully, that small subset was used to discredit the entire movement and portray it within certain media as violent and riotous. It is possible that, under the material and social constraints of modern society, a scholar like Machiavelli would concede that the violence and evils that Sharp rejects are considerably more volatile and contentious than they have been in the past.

With the discussion of necessary evil and optics, the question of the relationship between politics and ethics arises. Many scholars of Machiavelli have noted that he separates standard ethics from the realm of politics.[10] His focus on results and insistence that adherence to ethical standards will result in ruin,[11] make it clear that he feels that ethical standards are simply too limiting in the political realm to be of use beyond optics. As such, Machiavelli is often considered one of the great political pragmatists. This is, perhaps somewhat strangely for a theorist of nonviolence, a descriptor also used for Gene Sharp. This stems from Sharp's instrumentalist view of nonviolence and his advocacy that it be used "for pragmatic reasons [rather] than for religious or ethical ones."[12] Both Machiavelli and Sharp do not view ethics as the motivator behind their prescribed courses of action. This is what separates Sharp, as a "pragmatic" theorist of nonviolence, from the so-called "principled" theorists like Ghandi or the Dali Lama[13]. Like Machiavelli, he is concerned not with doing what is right or good, but with finding the most effective ways to achieve desired political outcomes, a position empirically supported by studies like those conducted by Stephan and Chenoweth.[14] For this reason, Sharp is sometimes even referred to as "the Machiavelli of

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[10] Carta, "Gramsci and *The Prince*," 355.

[11] Machiavelli, *The Prince*, 61.

[12] Gene Sharp quoted in Thomas Weber, "Nonviolence Is Who? Gene Sharp and Gandhi," *Peace and Change* 28:2 (April 2003): 252.

[13] Thomas Weber, "Nonviolence Is Who? Gene Sharp and Gandhi," *Peace and Change* 28:2 (April 2003): 251.

[14] Maria J. Stephan and Erica Chenoweth, "Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict." *International Security* 33:1 (2008): 7-44. http://www.jstor.org.ezproxy.library.uvic.ca/stable/40207100.

Nonviolence."[15] Both thinkers are concerned with results and the best means by which to achieve them. Sharp proposes nonviolence as the best course of action because of how he conceptualizes the interaction of social forces in the times he lives in and how they relate to the explosion of channels for information dissemination. Machiavelli argues that you should always be flexible and adapt to the reality that you face and it may be that Sharp's adaptation of nonviolent methods is simply that. After all, Sharp himself does not believe that violence is inherently evil. The problem that he identifies is that actors view violence as the only available means for the resolution of conflict.[16] To use a more Machiavellian description, those who view violence as the only option lack adaptability and they will not be successful unless they are fortuitous enough to be in a situation where their cause can succeed despite the backfire and delegitimization caused by their methods. It is even possible that Machiavelli could agree with Sharp on the adoption of nonviolent methods. After all, violent action is just one type of action that groups can take, and if it were not the most effective option available, then Machiavelli would likely not endorse it.

This is not to say, however, that either theorist would advocate for an end to conflict. Both Machiavelli and Sharp agree that conflict is inevitable and indeed sometimes positive. Machiavelli embraces conflict in all the forms that he had been exposed to in his time. Fighting, argument, debate, and war are all part of natural social life. Conflict for Machiavelli was not a disruption of the healthy

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[15] John-Paul Flintoff, "The Machiavelli of Non-violence" *The NS Profile* (January 3, 2013). http://www.newstatesman.com/politics/your-democracy/2013/01/gene-sharp-machiavelli-non-violence

[16] Gene Sharp, *There are Realistic Alternatives* (United States of America: Albert Einstein Institute, 2003), 2.

operation of a society, but indeed the cause of it.[17] Sharp in turn argues that conflict is a necessary aspect of a well functioning society, since it can hold regimes to account and bring about change.[18] There is a difference between *The Prince* and Sharp's work, which is that *The Prince* is more concerned with establishing and maintaining power, while Sharp is largely concerned with the disruption of existing regimes, but they both fundamentally refer to the process of crafting a society that is better for all of its members. When Machiavelli describes the purpose of *The Prince,* he evokes the metaphor of the plains and the mountain. A ruler who looks down upon the people, like a mountain looks down upon the plains, can know the people and observe their behaviour. Similarly, the populace who look up at the ruler like the plains unto the mountaintop are able to observe the behaviour of rulers with objectivity. He proposes the centrality of representation in understanding and the importance of considering how actions will be perceived by outside observers as being of paramount importance. Sharp and Machiavelli offer ways of looking at society that do not necessarily disagree, but are simply imagined from a top down and bottom up perspective respectively.

The final point of comparison between Machiavelli and Sharp is their agreement on the importance of both taking time to establish necessary groundwork and having the capacity for great speed. As Simon Glezos observes, *The Prince* articulates a *virtu* that can be divided into two distinct types, a "slow *virtu*" and a "fast *virtu*".[19] Slow *virtu* refers to things like the building of dykes and dams in the present in order to mitigate the possibility of future

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[17] Carta, "Gramsci and *the Prince*," 356.
[18] Gene Sharp, *There are Realistic Alternatives,* 3.
[19] Glezos, "Virtuous networks," 545.

disaster.[20] This kind of *virtu* allows prudent leaders to predict future events and establish safeguards. However, Machiavelli also states that *Fortuna* is fickle and that even the wisest rulers cannot predict the future perfectly. As such, a faster sort of *virtu* is required to adapt to new situations as they arise. Glezos notes the 2011 uprisings in Egypt as an example,[21] in which we see how social networks and protest groups, employing Sharp's methods for nonviolent conflict, can embody these joint ideals of *virtu.* The kind of coordination and training required for the sustained movements that Sharp describes in his work,[22] and that was seen in Egypt in 2011, takes a great deal of forethought and "slow *virtu.*" Though these protests were sometimes referred to as the "Facebook Protests"[23] because of the ways that social media was employed to quickly spread information about events, the process by which opinions were formed and people were won over to the cause was a long one. As well, precautions like the training of civilians to uphold nonviolence even in the face of physical coercion by police and military forces, as recommended by Sharp and as happened in Egypt, requires careful preparation and long-term consideration. Conversely, the ways that cellphones and social media were used as a tool by activists so that they could stay abreast of police movements are a perfect example of using the technology of the modern era to establish a more reactive and flexible organization with the capacity for speed and bold action that Machiavelli also prizes. Both Sharp and Machiavelli develop ideas of long- and short-term political activity that stress the importance of planning as well as reactive and adaptive capacity.

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[20] Machiavelli, *The Prince*, 99.

[21] Glezos, "Virtuous networks," 534.

[22] Sharp, *From Dictatorship to Democracy*, 31.

[23] Glezos, "Virtuous networks," 545.

Though they differ on the appropriateness of violence as a tool of political action, both Machiavelli and Gene Sharp articulate a deeply pragmatic conception of politics. Once one looks past the hegemonic interpretations of *The Prince*, it becomes possible to understand the ways in which Machiavelli's infamous piece actually shares many of the core themes of Sharp's nonviolent theory. Both thinkers articulate an understanding of government regimes as operating through the consent of the populace and that taking action that is societally frowned upon can cause potentially ruinous resentment towards actors that can entirely undermine their political efforts. They also share a rejection of personal ethics as the driving force behind political action and embrace conflict as part of a healthy social environment. Finally, both Sharp and Machiavelli understand the importance of short- and long-term abilities, and the requirement for having speed and planning work in harmony for political success. It is even conceivable that, given the context of modern communications technology and societal norms, Machiavelli should understand or even embrace the ideas of a nonviolent theorist like Gene Sharp.

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