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Special Issue on Jessica Flanigan's *Pharmaceutical Freedom: Why Patients Have a Right to Selfmedicate*

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In *Pharmaceutical Freedom* Jessica Flanigan holds that there is a certain oddity in the current American approach to informed consent: while it justifies allowing patients to refuse to receive treatment to which they do not consent it does not similarly enable them always to access treatments that they wish to receive. This asymmetry is often justified by appeal to two distinct arguments: that restricting persons' access to medication is required to protect them from utilizing medications that might harm them, or that persons' access to medications needs to be restricted to prevent them from utilizing treatments in ways that wrongly impose harms on others.

The first—paternalistic—argument is grounded on empirical and normative claims. The empirical claim is that healthcare professionals have more knowledge of the effects of medication than laypersons. The normative claim is that this expertise should be drawn upon to help patients make choices about their treatment. But, Flanigan argues, even if the empirical claim is correct it does not follow that persons should be required to seek medical advice. Moreover, she argues further, imposing this requirement on persons might lead them to abdicate their autonomy with respect to some of their medical choices and simply become dependent on healthcare professionals.

But, while Flanigan supports freeing persons from many of the current restrictions that they face with respect to pharmaceutical access, she does support the regulation of both vaccines and antibiotics. Requiring persons to be vaccinated and restricting the use of antibiotics are both justified, Flanigan argues, because both unvaccinated people and the misuse of antibiotics unjustly impose the risk of harm on third parties.

Flanigan's proposals are provocative and, in the context of contemporary pharmaceutical regulation, radical. They are also timely—most obviously, the worldwide COVID-19 pandemic has reinvigorated debate about the morality of mandatory

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vaccination. But, the issues that Flanigan addresses are not merely topical but perennial. They are also of great practical importance—in some cases getting the answers to the questions that Flanigan addresses can quite literally be a matter of life or death. Discussion of these issues is thus imperative so that the regulatory approach taken towards pharmaceuticals is that which has the best theoretical justification. The aim of this Special Issue is to facilitate this discussion of Flanigan's important work.

The first paper that appears in this Special Issue is Jeffrey Carroll's "Is Visiting the Pharmacy Like Voting at the Poll? Behavioral Asymmetry in *Pharmaceutical Freedom*". Carroll observes that while Flanigan believes that patients have a right to self-medicate she also believes that persons are "influenced by unjustified cognitive biases" (Flanigan, 2017, p. 143).

Carroll observes that the question of whether persons have a moral right to self-medicate is distinct from the political question of how this right is to be implemented (assuming that persons possess it). Carroll notes that there are two approaches to the political right to self-medicate: a bottom-up approach that arises from a democratic process or a top-down approach that is the result of legislation (Carroll, 2022). Flanigan favors the latter on the grounds that voters are subject to cognitive bias and hence reforms should proceed non-democratically (Flanigan, 2017, p. 143). But, Carroll notes, Flanigan's view that voters will be subject to such biases (and so their judgements concerning pharmaceutical regulation should not be trusted) posits a asymmetry between persons as voters and persons as patients, for she holds that she believes that patients are "in the best position to judge" whether the risks of taking a particular medication are acceptable (Flanigan, 2017, p. xv). Carroll notes that positing this asymmetry is not necessarily problematic: it is possible that persons are systematically subject to bias in one decision-making domain and yet free from this in another (Carroll, 2022). But, he then argues that this is not the case, and that there is reason to believe that persons are subject to bias in a non-trivial number of cases when making medical decisions. This, he argues, has an important implication for Flanigan's argument: That the putative right to self-medicate must rest on "on a patient's authority in deciding what to do" (Carroll, 2022; Flanigan, 2017, p. 30). Carroll is skeptical that the rights-based argument that he attributes to Flanigan based on this putative authority possessed by patients is sound. After outlining reasons in support of this skepticism Carroll then argues that the bottom-up approach to the political question of whether patients have a right to self-medicate is preferable to the top-down approach favored by Flanigan. Rather than arguing for a political right to access medication, Carroll argues for the absence of restrictions imposed on access to certain pharmaceuticals (Carroll, 2022). This bottom-up approach, Carroll argues, would benefit both from the local knowledge possessed by members of a community and also from the possibility that individuals could chose to live in communities that prevented them from accessing pharmaceuticals at will.

Carroll agrees with Flanigan that here should not be top-down restrictions on persons' ability to access pharmaceuticals. This "pharmaceutical freedom" approach is also adopted by Joseph T. H. Roberts in his paper "How to Regulate the Right to Self-Medicate". Like Flanigan and Carroll, Roberts supports persons having greater access to pharmaceuticals. However, he notes that for Flanigan's policy

recommendations to be implemented in practice her theoretical arguments must be supported by detailed policy proposals. In support of Flanigan's approach Roberts offers an account of how her approach could work in practice. He argues that pharmaceutical liberalization should be accompanied by the requirement that pharmacist be subject to mandatory disclosure rules, so that their obligations to disclose are "in line with those of clinicians seeking informed consent for treatment" (Roberts, 2022, 244). He also argues that to safeguard incompetent people from harm, drugs should be placed behind the counter. Roberts then explores how the relationship between patients and pharmacists could work given the two protective proposals that he outlines.

But while both Carroll and Roberts are persuaded by Flanigan's arguments in favor of a more permissive approach to pharmaceutical access, Jonathan Quong remains more skeptical. In his contribution to this issue ("On Flanigan's *Pharmaceutical Freedom*"), Quong argues that "despite what Flanigan claims, "there is a coherent way to endorse the Doctrine of Informed Consent while resisting the view that there is a right to self-medicate" (Quong, 2022, 257). Quong argues that it is plausible to justify the requirement that persons provide their informed consent to their medical treatment on the grounds that this is required to protect the bodily integrity of persons. But, Quong argues, if the Doctrine of Informed Consent is justified on this basis it will not follow that this doctrine supports person's access to the pharmaceuticals that they desire. Interfering with a person's access to the pharmaceuticals that she desires will not infringe on her bodily integrity. Quong also argues that Flanigan's arguments support the view that it permissible for persons "to take certain drugs from pharmaceutical companies or pharmacies—without paying the full price—for the purpose of providing these drugs to people who cannot afford them and urgently need them" (Quong, 2022, 263). This is because, Quong argues, Flanigan argues in favor of the view that it is permissible for persons to disobey laws that prohibit self-medication as these laws are unjust and so violate important rights held by individuals (Flanigan, 2017, 149–154). Moreover, Quong notes, Flanigan also argues that one effect of these unjust laws is to increase the cost of some of the drugs that they regulate (Flanigan, 2017, pp. 184–190). Since Flanigan holds that it is permissible for persons to violate unjust laws, and since the laws inflating drug prices are unjust, Quong concludes that she is committed to the claim that it is permissible for persons to secure drugs and only pay what would be the just price for them were they not to be subject to the unjust laws that inflated their price.

Just as Quong extends Flanigan's arguments to support permissible theft so too does Connor K. Kianpour extend her arguments to justify the regulation of drugs such as varenicline and alcohol. In his paper "It Only Affects Me: Pharmaceutical Regulation and Harm to Others" Kianpour argues that Flanigan's arguments in favor of regulating vaccines and antibiotics should best be understood as arguments that are aimed at protecting third parties from impermissible risks that might be imposed on them by others (Kianpour, 2022). Drawing on studies that link the smoking cessation drug varenicline to the occurrence of neuropsychiatric adverse events Kianpour works to establish that the wrongdoing performed by a varenicline user who was so adversely affected would be nontrivial. With this data in hand Kianpour argues that the moral need to avoid the imposition of impermissible risks on third

parties would justify the regulation of varenicline. Kianpour then extends his argument to support the regulation of recreational drugs such as alcohol. Kianpour notes that the similarities that he identifies between the risks that could be imposed on third parties by users of drugs such as varenicline and alcohol and the risks that could be imposed on third parties by a failure to vaccinate or the overuse of antibiotics could be accepted by Flanigan as an extension of her view. But, Kianpour notes, the extension of regulation that this acceptance would lead her to endorse might also be rejected by her on the grounds that it would involve regulatory overreach. In that case, Kianpour observes, Flanigan will need to determine if her views concerning the regulation of vaccines or antibiotics should be retained or rejected.

In the final paper of this Special Issue Jessica Flanigan responds to her critics (Flanigan 2022). She concludes that her critics have led her to rethink her views on the scope of protections that a person's bodily rights afford her, and to reflect more on the methodological commitments of *Pharmaceutical Freedom*.

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